84-1746

No. ——

Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

K N ENERGY, INC.,
Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

ROBERT C. McHUGH, Esq.
K N Energy, Inc.
P.O. Box 15265
Lakewood, Colorado 80215

B. J. BECKER, Esq.
K N Energy, Inc.
P.O. Box 609
Haskup, Nebraska 68901

JOHN P. FURMAN, Esq.
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JOHN T. MILLER, JR., Esq.
1001 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 331-1630

Attorneys for K N Energy, Inc. *Counsel of Record*

May 6, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

This appeal arises from a suit for breach of contract brought in a Colorado District Court by an industrial customer against K N Energy, Inc.[1] (K N), an interstate natural gas pipeline company regulated by the Federal Power Commission and its successor the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act. The service was interruptible under certificates of public convenience and necessity issued by the Commission. The trial court found a breach of contract on summary judgment without considering Commission regulation. Damages may be measured by the cost of the fuel oil used by the customer to replace the natural gas which the pipeline did not supply. Efforts by the pipeline company, with the support of the Commission, to refer to the Commission issues that were within the Commission's exclusive and primary jurisdiction were rejected by the trial court, the court of appeals and

---

[1]The name of Kansas-Nebraska Natural Gas Company, Inc., was changed to K N Energy, Inc. in April 1983. In compliance with Rule 28.1, K N states that, through Midlands Transportation Company (a wholly-owned subsidiary), it owns 20 percent of the stock of Energy Transportation Systems, Inc. In addition, through Slurco Corporation (another wholly-owned subsidiary), K N is a partner in the ETSI Pipeline Project, a joint venture.

[2] In addition to K N and the plaintiff, The Great Western Sugar Co., two other parties participated in the proceedings before the Supreme Court of Colorado. The Commission filed a petition for a writ of certiorari but did not participate further when the court declined to review the question of "primary jurisdiction." The Interstate Natural Gas Association ("INGAA") filed a petition to intervene and a memorandum brief in support of the grant of

the Supreme Court of Colorado.[2] This petition presents the following questions:

> Whether the Colorado courts failed to respect the exclusive and continuing jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act over interruption of natural gas transported in interstate commerce and ignored or misinterpreted the related obligations of a regulated interstate natural gas pipeline under its certificates of public convenience and necessity, tariff, and wholesale service agreements. *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

> Whether an award of damages for interruptions in interruptible service would create an undue preference and violate the filed rate doctrine where the consumer is not a customer of the interstate pipeline but is served indirectly through a sale-for-resale customer under a tariff on file with the Federal Energy Regulatory Commission (or its predecessor, the Federal Power Commission). *Arkansas Louisiana Gas Company* v. *Hall*, 453 U.S. 571 (1981).

---

a writ of certiorari. INGAA is a nonprofit national trade association whose membership includes virtually all of the major interstate natural gas transmission companies subject to regulation by the Commission.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
The Supremacy Clause	2
Statutes and Regulations Involved	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	13
A. The Colorado courts failed to respect the exclusive and continuing jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act over the interruption of natural gas transported in interstate commerce and ignored or misinterpreted the related obligations of a regulated interstate natural gas pipeline under its certificates of public convenience and necessity, tariff, and wholesale service agreements. As a consequence, K N has been found in breach of contract for failing to provide a service it was not authorized to render.	13
1. The jurisdiction of the Commission.	13
2. The mistaken approach of the Colorado Supreme Court.	17
a. Orders in certificate proceedings.	18
b. Policy statements.	20
c. K N's tariff.	22
3. The need for guidance from this Court.	24

TABLE OF CONTENTS continued

Page

B. An award of damages for interruptions in interruptible service would create an undue preference and violate the filed rate doctrine where the consumer is not a customer of the interstate pipeline but is served indirectly through a sale-for-resale customer under a tariff on file with the Federal Energy Regulatory Commission (or its predecessor, the Federal Power Commission). 25

CONCLUSION 28

APPENDICES:

Appendix A 1a
Appendix B 33a
Appendix C 57a
Appendix D 59a
Appendix E 63a
Appendix F 65a
Appendix G 70a
Appendix H 73a
Appendix I 76a
Appendix J 78a
Appendix K 88a

TABLE OF AUTHORITIES

CASES: Page

Amalgamated Meat Cutters v. *Jewel Tea Co., Inc.*, 381 U.S. 676 (1965) 17

Appalachian Power Company v. *Federal Power Commission*, 529 F.2d 342 (D.C. Cir. 1976) 23

Arkansas Louisiana Gas Company v. *Hall*, 453 U.S. 571 (1981) 10, 27

Commissioner of Internal Revenue v. *Sunnen*, 333 U.S. 591 (1948) 24

Far Eastern Conference v. *United States*, 342 U.S. 570 (1952) 16, 17

Federal Energy Regulatory Commission v. *Mississippi*, 456 U.S. 742 (1982) 15

Federal Power Commission v. *Louisiana Power & Light Company*, 406 U.S. 621 (1972) ... 8, 13, 14, 15, 21

Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942) 15

Federal Power Commission v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) 23

International Brotherhood of Boilermakers v. *Hardeman*, 407 U.S. 233 (1971) 17

Minneapolis Gas Company v. *Federal Power Commission*, 294 F.2d 212 (D.C. Cir. 1961) 24

Montana v. *United States*, 440 U.S. 147 (1979) 24

Pacific Gas and Electric Co. v. *Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974) 20

Panhandle Eastern Pipe Line Co. v. *Public Service Comm'n of Indiana*, 332 U.S. 507 (1947) 13, 14

Public Service Company of Indiana, Inc. v. *Federal Energy Regulatory Commission*, 575 F.2d 1204 (7th Cir. 1978) 23

TABLE OF AUTHORITIES continued

Page

Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) 17

Tyler Gas Service Company v. *Federal Power Commission*, 247 F.2d 590 (D.C. Cir. 1957) 23

United Gas Pipe Line Co. v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958) 23

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) 23

United States v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966) 24

United States Navigation Co. v. *Cunard Steamship Co.*, 284 U.S. 474 (1932) 16, 17

Weinberger v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645 (1973) 17

COMMISSION DECISIONS:

Kansas-Nebraska Natural Gas Company, Inc., 12 FPC 505 (1953) 5

Kansas-Nebraska Natural Gas Company, Inc., 28 FPC 1079 (1962) 5

Kansas-Nebraska Natural Gas Company, Inc., 30 FPC 356 (1963) 6

Kansas-Nebraska Natural Gas Company, Inc., 32 FPC 723, 856 (1964) 5

Kansas-Nebraska Natural Gas Company, Inc., 34 FPC 70 (1965) 6

Kansas-Nebraska Natural Gas Company, Inc., 39 FPC 168 (1968) 6

Kansas-Nebraska Natural Gas Company, Inc., 41 FPC 449 (1969) 5, 6

TABLE OF AUTHORITIES continued

Page

Kansas-Nebraska Natural Gas Company, Inc., 44 FPC 218 (1970) 6, 26

Kansas-Nebraska Natural Gas Company, Inc., 45 FPC 611 (1971) 6

Kansas-Nebraska Natural Gas Company, Inc., 1 FERC ¶ 61,218 (1977) 6

Kansas-Nebraska Natural Gas Company, Inc., 50 FPC 570 (1973) 6

Kansas-Nebraska Natural Gas Company, Inc., 52 FPC 1043 (1974) 6

Kansas-Nebraska Natural Gas Company, Inc., 53 FPC 990 (1975) 6

Kansas-Nebraska Natural Gas Company, Inc., 54 FPC 1434 (1975) 6

Kansas-Nebraska Natural Gas Company, Inc., 55 FPC 1956 (1976) 6, 19

Kansas-Nebraska Natural Gas Company, Inc., 56 FPC 2003 (1976) 6

Kansas-Nebraska Natural Gas Company, Inc., 17 FERC ¶ 61,102 (1981) 6, 24

U.S. CONSTITUTION:

Article VI, Clause 2 ("The Supremacy Clause") 2, 15

STATUTE AND REGULATIONS:

Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*:

Section 1(b) 2

Section 4 ..... 17, 21

Section 4(b) 8, 10, 25

Section 7 5

TABLE OF AUTHORITIES continued

Page

18 C.F.R.:
Section 154.21 26
Section 157.20(e) 26

COMMISSION ORDERS:
Order No. 431, 45 FPC 570 (1971) 19, 21
Order No. 498, 50 FPC 1954 (1973) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ——

K N ENERGY, INC.,
Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

K N Energy, Inc. petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Colorado in this case.

OPINIONS BELOW

The unreported opinion of the Supreme Court of Colorado issued January 14, 1985 for which review is sought is set out in Appendix A. That opinion affirmed a decision of the Court of Appeals of Colorado (Appendix B) which is reported at 661 P.2d 684 (Colo. App. 1982). In that decision the Court of Appeals

affirmed in part and reversed in part actions by the Colorado District Court in and for the County of Logan in a proceeding captioned *The Great Western Sugar Company* v. *Northern Natural Gas Co. and Kansas-Nebraska Natural Gas Co., Inc.* (Civil Action No. 13503) (see Appendices F and G).

JURISDICTION

Rehearing of the decision of the Supreme Court of Colorado was denied on February 4, 1985. The jurisdiction of this Court to review the decision rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause

(U.S. Constitution, Article VI, Clause 2)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statutes and Regulations Involved

Section 1(b) of the Natural Gas Act provides:[1]

> The provisions of this act shall apply to the transportation of natural gas in interstate com-

[1] 15 U.S.C. § 717(b). For other relevant provisions of the Natural Gas Act see Appendix C and for relevant regulations issued by the

merce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT

This case involves a conflict between (1) Colorado contract law as applied in a suit brought in a Colorado state court against an interstate pipeline for breaches of contracts governing the sale of natural gas under interruptible service contracts and (2) the obligations of that pipeline as a "natural-gas company" regulated under the Natural Gas Act.

The law suit was filed on January 8, 1978 by The Great Western Sugar Company (Great Western) in the District Court in and for the County of Logan, Colorado against Northern Natural Gas Company (Northern) and Kansas-Nebraska Natural Gas Co., Inc. (now K N Energy, Inc.) (K N) for failure, beginning in 1973, to deliver natural gas to four of Great Western's sugar beet factories "at such times as they were obligated to do so" by contract. A second claim for relief alleged that increased interruptions in service had resulted from a change in policy designed

---

Commission thereunder see Appendix D. References to "the Commission" should be understood as referring to the Federal Power Commission prior to October 1, 1977 and to the Federal Energy Regulatory Commission thereafter.

to permit K N to enhance or maintain its gas supplies in storage fields for later sale to other customers, that K N had failed to disclose this change in policy, and that this failure to disclose constituted fraud.[2] This change in policy occurred in November 1973 when K N decided that it should interrupt service to interruptible customers whenever conditions on its system required the withdrawal of gas from storage in the winter heating season in order to assure continuing deliveries to residential and commercial (firm service) customers.[3]

---

[2] Great Western's original complaint included a third claim for relief alleging that K N had induced Great Western to install gas fired equipment and asked for an order requiring K N to supply gas to the factories for the life of this equipment. This third claim was later withdrawn.

[3] The summary judgment against K N in the Colorado District Court was reviewed by the Colorado Court of Appeals. The Great Western Sugar Company v. Northern Natural Gas Co., *et al.*, 661 P.2d 684 (Colo. App. 1982). In its opinion the Court of Appeals described in these terms the situation which K N faced in 1973, including its increasing dependence on gas in storage to meet the peak period requirements of high-priority customers:

> "Beginning in the late 1960's there was a national gas shortage. KN's gas reserves were being consumed at a rate faster than they were being replaced by new discoveries. In addition to declining gas reserves, gas pressure declined throughout KN's system because of the depletion of old wells and the reduction in pressure rate of flow, or deliverability. KN had begun utilizing underground storage reservoirs in 1964 to store gas at points on the system nearer the markets, where it could be utilized to maintain pressures in the pipeline. It became increasingly necessary to supplement deliverability from producing fields with deliverability from storage to maintain necessary pipeline pressure." 661 P.2d at 688.

K N supplied three of Great Western's plants directly.[4] The transportation of gas by K N to the plants in interstate commerce was governed by certificates of public convenience and necessity issued by the Commission under Section 7 of the Natural Gas Act.[5] The certificated service was conditioned upon K N's compliance with all applicable rules and regulations under the Natural Gas Act. Contracts between K N and Great Western entered into in 1973 contained the following provision on "Regulation":

> This agreement and the respective rights and obligations of the parties hereto are subject to all valid and applicable laws and orders, rules and regulations of duly constituted authorities having jurisdiction or control over the parties, Kansas-Nebraska's facilities and gas supply, or any transaction contemplated hereby.

In addition, the contracts contained a provision on "interruption" by which K N was given the right, "in its absolute discretion and without liability to Buyer for damages or otherwise," to "interrupt in whole or in part delivery of gas to Buyer hereunder as and whenever from time to time K N is required to do so in order to meet the demands of domestic and commercial users or other users having a higher priority of service."

The fourth Great Western plant, located at Goodland, Kansas, was supplied by the Peoples Division

---

[4] The plants were located at Scottsbluff, Nebraska and at Ovid and Sterling, Colorado.

[5] Kansas-Nebraska Natural Gas Company, Inc., 12 FPC 505 (1953), 28 FPC 1079 (1962), 32 FPC 723, 856 (1964) and 41 FPC 449 (1969).

of Northern Natural Gas Company ("Northern") with gas purchased by Northern from K N under a Service Agreement in the form prescribed by K N's Gas Tariff on file with the Commission. The service was rendered under certificates of public convenience and necessity issued by the Commission.[6]

K N has four storage fields on its system. Two of the fields (at Adolph, Kansas and Springdale, Nebraska), developed when part of K N's intrastate systems, were certificated by the Commission when interconnected with K N's interstate system.[7] The development and operation of the other two much larger storage fields (Huntsman and Big Springs in Nebraska), were authorized by certificates of public convenience and necessity issued under the Natural Gas Act.[8] In applying for certificates for its largest fields, K N represented that the primary use of these storage fields would be to assure the availability of gas to meet the requirements of firm service residential and commercial customers during periods of peak demands.

An attempt by K N to remove Great Western's suit to the United States District Court for the District of Colorado failed. K N then moved to dismiss the

---

[6] Kansas-Nebraska Natural Gas Company, Inc., 44 FPC 218 (1970), 50 FPC 570, 1280, 1779 (1973), 52 FPC 1043 (1974), 54 FPC 1434 (1975), 56 FPC 2003 (1976), and 1 FERC ¶ 61,218 (1977).

[7] Kansas-Nebraska Natural Gas Company, Inc., 41 FPC 449 (1969), 53 FPC 990 (1975).

[8] Kansas-Nebraska Natural Gas Company, Inc., 30 FPC 356 (1963), 34 FPC 70 (1965), 39 FPC 168 (1968), 45 FPC 611 (1971), 55 FPC 1956 (1976).

suit on the grounds that the suit constituted an impermissbile collateral attack on Commission policies, orders, rules and regulations and that plaintiff had not exhausted its administrative remedies (Appendix E). The motion was denied.

Great Western filed a motion for partial summary judgment as to the three directly served plants, contending that no genuine issue of material fact existed as to the interpretation of the contracts between Great Western and K N. The trial court granted Great Western's motion on the ground that K N's contracts with Great Western permitted K N to interrupt service *only* to protect the short-term (24 to 36 hours) needs of its domestic and commercial customers and did not authorize the withholding from interruptible customers of gas in storage.[9] (See Appendix F). The Court denied K N's motion for reconsideration in which it argued that there were issues of material fact which could not be disposed of by summary judgment and that orders issued by the Commission "required Kansas-Nebraska to husband gas in its storage fields

---

[9] The contracts contained no such specific terms. Great Western's separate motion for partial summary judgment against K N related to its supply to Northern at Goodland. Although the Court took the position that K N breached its service agreement with Northern for the same reasons it had breached its contracts with Great Western, the motion was denied on the ground that there was a factual issue which a jury should decide: whether K N and Northern intended Great Western to be a third-party beneficiary. See Appendix G. The jury later found that Great Western had this status and was entitled to damages from K N for interruptions by Northern at Great Western's plant at Goodland, Kansas. As to the suit by Great Western against Northern, the jury found for Northern.

for its high priority users and abrogated provisions of its contracts which were inconsistent therewith." K N's motion for referral to the FERC of ten specified issues (see Appendix H) was denied[10] despite arguments by the Solicitor of the Commission in an *amicus* brief, that "[B]efore this Court determines the legal consequences of K N's alleged actions, there should first be a determination by the Commission of the issues listed in K N's motion to refer which are in the Commission's primary or exclusive jurisdiction to resolve."[11] (For the court's order see Appendix I.)

---

[10] The ten issues included whether K N's decision in 1973 that it should not provide service to large interruptible boiler fuel customers during periods of withdrawals from storage was in accordance with FPC policies and orders; whether Great Western's interpretation of the interruption provisions of its contracts was inconsistent with the terms of the certificates authorizing service to Great Western and the operation of K N's storage fields; and whether an award of damages to Great Western would constitute an undue preference or advantage in contravention of Section 4(b) of the Natural Gas Act.

[11] The FERC brief made, *inter alia*, the following points:

(1) "The question presented [for referral to the Commission] involves matters of substantial importance to the responsibilities of the Federal Energy Regulatory Commission. The natural gas service agreements which are the subject of this private litigation involve matters within the Commission's jurisdiction over interstate transportation of natural gas. . . . *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972)."

(2) "When a certificate [of public convenience and necessity] is issued by the Commission and accepted by the company, the Commission acquires a continuing jurisdiction over the services rendered thereunder and the operation of the certificated facilities." [Footnote omitted.]

(3) "The FERC does not have jurisdiction to adjudicate common law claims for contract liability [footnote omitted]; this Court does. However, ... the Commission has exclu-

K N then applied to the Colorado Supreme Court for a writ of prohibition, citing the Supremacy Clause of the U.S. Constitution (Appendix J). The petition was denied, without explanation, on June 21, 1979 (Appendix K), and the case proceeded to a jury decision on the issues of fraud, Great Western's third party status, and the amount of damages to be awarded Great Western.

Before the Colorado Court of Appeals, K N renewed its motion for a referral of specified issues to the

---

sive jurisdiction over the interpretation and enforcement of matters which are interposed between the parties' contracts and the execution by the pipeline of the terms of those contracts: certificates of public convenience and necessity and curtailment plans. Finally, when the issue is the allocation of reductions in natural gas service, it is particularly important that there be uniformity of regulation, so that the allocation is not unduly discriminatory."

(4) "The issues raised by this suit which are within the FERC's special competence should be referred to the Commission, because Great Western's claims against K-N for breach of contract . . . have ramifications far beyond their seeming simplicity. They represent a private controversy with transcendent public issues." [Footnote omitted.]

(5) "K-N's contracts with Great Western and with Northern are subject to the regulatory authority of the Federal Energy Regulatory Commission. Before this Court determines the legal consequences of K-N's alleged actions, there should first be a determination by the Commission of the issues listed in K-N's motion to refer which are in the Commission's primary or exclusive jurisdiction to resolve. Deferral to the Commission is particularly appropriate in this case, because the issues which this damage action invokes are highly complex and have an impact on the public interest which transcends the private litigation before this Court. There is a substantial possibility, absent reference to the Commission, of a conflict between the decisions of this Court and the Commission. Such conflict could affect the Commission's ability to regulate reductions in natural gas service in a uniform manner."

Commission on the basis that the Commission "has both exclusive and primary jurisdiction" over issues in the proceeding. The Commission filed an *amicus* brief arguing that the referral motion should be granted.

The Colorado Court of Appeals affirmed the summary judgment determination of the trial court but remanded the case for a new trial on the issue of damages to be awarded to Great Western. *The Great Western Sugar Company* v. *Northern Natural Gas Company, et al.*, 661 P.2d 684 (Colo. App. 1982). The Court of Appeals ruled that the trial court, in exercising its discretion, had not erred in refusing to refer particular issues to the FERC. In the opinion of the Court of Appeals, "Common law contract claims are the basis of this litigation, and these claims are within the conventional competence of state courts." (*Ibid.*) The Court did not comment on the jurisdictional claims made by the FERC in its *amicus* brief.[12]

---

[12] Following issuance of the opinion of the Court of Appeals, K N filed with the Commission a petition for a declaratory order which described the court proceedings in Colorado and asked the Commission to resolve the following questions: (1) whether, if K N had supplied all of Great Western's interruptible requirements during periods of storage withdrawal, it would have violated its obligations under its certificates, other Commission orders, and its FPC/FERC Gas Tariff; and (2) whether an award of damages to Great Western would constitute an undue preference or advantage under Section 4(b) of the Natural Gas Act (15 U.S.C. § 717c(4)(b)) or a violation of the "filed rate doctrine" (as defined in Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571 (1981). The Commission initiated a formal hearing in Docket No. TC82-43-000. K N Energy, Inc., 21 FERC ¶ 61,285 (1982). Great Western intervened and participated actively in the 47-day hear-

K N's petition for writ of certiorari to the Supreme Court of Colorado (Docket No. 82SC322) was supported by an *amicus* brief of the Commission relating to the matter of its jurisdiction. K N argued that the "FERC has exclusive and primary jurisdiction over issues in this case and a failure to refer issues to the FERC would violate the Supremacy Clause of the United States Constitution by interfering with the authority of the United States pursuant to the Natural Gas Act," and that the courts below had ignored "the limitations imposed upon Kansas-Nebraska by the certificates of public convenience and necessity issued by the FPC which authorized service to Great Western and the operation of Kansas-Nebraska's storage fields, the requirements imposed by rules, regulations, and orders of the Commission, and the terms of Kansas-Nebraska's Gas Tariff on file with the Commission" which includes the terms of service to sales-for-resale customers and provisions on limitations of deliveries applicable to both sales-for-resale customers and direct sale customers.

The Supreme Court of Colorado granted certiorari limited to the following issues:

> Whether the trial court erred in granting Great Western Sugar Company's motion for summary judgment on the issues of liability.

---

ing. The Administrative Law Judge issued his decision on February 27, 1985. The matter is pending before the Commission on exceptions filed by K N, Great Western and the Commission Staff. Great Western's challenge of the Commission's decision to hear the matter was dismissed on April 16, 1984 in The Great Western Sugar Company v. Federal Energy Regulatory Commission, D.C. Cir. No. 83-1135.

> Whether the trial court erred in excluding from evidence FERC orders, Kansas-Nebraska's certificates of public convenience and necessity and tariffs, and certain expert witness testimony.

The Court did not grant certiorari on whether the doctrine of "primary jurisdiction" required the referral of issues to the FERC. As a consequence, the Commission did not file an *amicus* brief on the issues before the Court.

The Supreme Court of Colorado affirmed the judgment of the Court of Appeals on January 14, 1985 (Appendix A), limiting its opinion to two subjects: the grant of summary judgment, including the effect of Commission orders, tariffs, and certificates; and certain evidentiary rulings made by the trial court. The Court relegated to a footnote K N's arguments regarding the Commission's exclusive jurisdiction:

> 8. In addition, K N claims that state court jurisdiction to award damages for nondelivery of natural gas is preempted by federal law, that the state court had no jurisdiction to award damages in this case because of the "filed rate doctrine," that even if the state court were to retain jurisdiction it must apply federal common law, and that GW failed to exhaust its administrative remedies. None of these matters are fairly raised by the issues upon which we granted certiorari, and we therefore do not consider them. C.A.R. 53(a)(3); *Vigoda* v. *Denver Urban Renewal Authority*, 646 P.2d 900, 907 (Colo. 1982). We expressly declined to review the intertwined questions of primary jurisdiction, exclusive federal jurisdiction and federal preemption raised in K N's petition for certiorari.

K N's petition for rehearing was denied by the Supreme Court of Colorado on February 4, 1985. Its judgment has therefore become final.[13]

REASONS FOR GRANTING THE PETITION

A. The Colorado courts failed to respect the exclusive and continuing jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act over the interruption of natural gas transported in interstate commerce and ignored or misinterpreted the related obligations of a regulated interstate natural gas pipeline under its certificates of public convenience and necessity, tariff, and wholesale service agreements. As a consequence, K N has been found in breach of contract for failing to provide a service it was not authorized to render.

1. *The jurisdiction of the Commission.*

When Congress enacted the Natural Gas Act in 1938, it gave the Commission jurisdiction over (1) the transportation of natural gas in interstate commerce, (2) the sale in interstate commerce of natural gas for resale, and (3) natural-gas companies engaged in such transportation or sale (15 U.S.C. § 717(b)). *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana,* 332 U.S. 507, 516 (1947). In the context of the gas shortages of the early 1970s, when an interstate pipeline filed with the FPC a proposed plan for the curtailment of deliveries including deliveries to direct-sale customers, the Fifth Circuit held (1) once the Commission has approved the construction and

---

[13] The District Court of Logan County has set the week of December 16, 1985 for the new trial on the issue of damages remanded by the judgment of the Court of Appeals.

operation of the facilities required to deliver gas transported in interstate commerce to a direct-sale customer, the Commission's authority over that sale is at an end (in the absence of an attempt by the pipeline to abandon service) and (2) "the FPC has no form of continuing certificate jurisdiction over direct sales to customers of interstate pipeline companies." *Louisiana Power & Light Company* v. *United Gas Pipe Line Company,* 456 F.2d 326, 338 (5th Cir. 1972).

This Court reversed in *Federal Power Commission* v. *Louisiana Power & Light Company,* 406 U.S. 621 (1972), holding that the Commission's transportation jurisdiction includes a continuing authority over deliveries of gas to direct-sale customers (except for the rates charged) and over interruptions in those deliveries. The Court quoted with approval[14] from *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana, supra,* 332 U.S. at 523:

> "[T]he matter of interrupting service is one largely related . . . to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states."[15]

This Court recognized that in exercising its jurisdiction over transportation "the Commission must possess broad powers to devise effective means to meet" its responsibilities. (406 U.S. at 642) It must

---

[14] 406 U.S. at 641.

[15] The curtailment of service contemplated by the Court in *Panhandle* occurred "when weather conditions or others require it". (332 U.S. at 523) The Court was not then concerned with a gas supply shortage of the nature experienced in the 1970s.

be free to make the "pragmatic adjustments which may be called for by particular circumstances." *Ibid.*, quoting from *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). It follows that, in lawsuits arising from reductions in deliveries of natural gas to interruptible direct-sale customers, state courts and lower Federal courts have an obligation to respect the jurisdiction, orders and expertise of the Commission and to avoid decisions which nullify valid Commission orders.

In *Louisiana Power & Light* this Court recognized that if the courts[16] and regulatory agencies in each state were free to determine whether, how, and when an interstate pipeline may interrupt service to direct industrial customers it could lead to contradictory results. In such circumstances "the desirability of uniform federal regulation is abundantly clear."[17]

During the period covered by this lawsuit, KN served some 100 direct industrial customers in the States of Kansas, Nebraska, Colorado and Wyoming. The service involved in this appeal was certificated by the Commission as interruptible service, which means that the customer was not entitled to receive gas whenever it wanted it but only when the pipeline offered it. Such interruptible service lacks a volumetric entitlement. The decisions of the Colorado courts effectively converted this interruptible service to firm service, finding a breach of contract because KN changed its

---

[16] The Supremacy Clause applies to state court decisions as well as to those of regulatory agencies. Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 766 (1982).

[17] 406 U.S. at 633-4.

forecast base for interruptions and denied an interruptible customer access to storage gas without its consent. K N is exposed to the payment of damages for failure to supply the full natural gas requirements of Great Western.[18] The courts did not base their decision on a violation by K N of the Natural Gas Act, Commission orders or K N's tariff.

The state courts usurped a function which is within the Commission's exclusive jurisdiction, namely, the upgrading of certificated interruptible service.

In such a case of exclusive jurisdiction, the state courts are obliged to refer to the Commission the question of the nature of the interruptible service to which Great Western was entitled in light of the requirements of the Natural Gas Act, and applicable Commission orders, rules and regulations and K N's tariff. This Court stated the governing principle in cases of "exclusive preliminary jurisdiction" in *Far Eastern Conference* v. *United States,* 342 U.S. 570, 574-5 (1952):

> The Court [in *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1972)]. . .

---

[18] In the jury trial on damages, K N was afforded an opportunity to demonstrate that it could not supply Great Western. Its proof in that respect was rejected for various reasons sustained by the Supreme Court of Colorado. (Opinion at pp. 29-36) K N's firm residential and commercial market requirements increase significantly as the weather gets colder. The pipeline has to be able at all times in the winter to meet demands which the coldest weather conditions which might be experienced could impose on its pipeline system. As design conditions are in fact seldom experienced, it is difficult to demonstrate, after the fact, that K N did not have to interrupt interruptible customers to protect its firm market.

applies a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.[19]

2. *The mistaken approach of the Colorado Supreme Court.*

The opinion of the Supreme Court of Colorado illustrates what can occur when a state court refuses to avail itself of the specialized competence of an administrative agency and attempts to dispose of issues which ought to have been referred to the agency. In the present case these issues include the interpretation of Commission orders in certificate proceedings authorizing the operation of pipeline transportation facilities, including storage facilities, and policy state-

---

[19] For applications of the principle of *Cunard* and *Far Eastern Conference* see Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 654 (1973); Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 305 (1973); International Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233, 238 (1971), quoting from Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., Inc., 381 U.S. 676, 684-685 (1965).

ments issued in the 1970s as a result of natural gas supply shortages.

a. *Orders in certificate proceedings.*

Having refused to consider the question of exclusive federal jurisdiction, the Supreme Court of Colorado examined the case from the wrong end. Instead of seeking to determine whether the Commission authorized the service the trial court's judgments implied was Great Western's entitlement, the Court examined those orders to see if they were inconsistent with the construction the trial court placed on the contracts on summary judgment. This is not a mere matter of emphasis. The Court's approach assured that K N's primary obligation to supply firm service, and to develop and operate storage fields to assure a capability to maintain such service, would be passed over, and that the Commission's intention that K N have no obligation to provide interruptible customers with any specific volume of natural gas be ignored.

The Supreme Court of Colorado was advised by K N that when it first asked for permission to serve Great Western's plant at Ovid, Colorado, the Commission directed that the facilities being authorized were not to be operated to render firm service to any interruptible customers without further Commission authorization. The Court usurped the Commission's function by concluding that this certificate condition "is consistent with a contract that *prevents* K N from implementing its storage withdrawal interruption policy . . . ."[20] (Emphasis supplied.)

---

[20] Opinion at p. 17.

The Supreme Court also usurped the authority of the Commission in connection with the development and operation of the Big Springs Storage Field in Nebraska.[21] K N's application in that proceeding advised the Commission that Big Springs was needed to "carry out conservation practices, [and] husband gas for high priority firm gas customers . . . ." In issuing the certificate the Commission noted that deliverability studies by K N indicated that its sources of gas supply "will be unable to meet peak requirements during the 1976-77 heating season and consequently, Big Springs peaking capabilities will be required during this period and in subsequent years."[22] The Commission also noted in its certificate order that K N had adopted the policy of not withdrawing gas from underground storage to serve interruptible industrial customers.[23] The Supreme Court of Colorado contradicted these purposes by asserting that the Commission was withholding approval of the storage withdrawal interruption policy for consideration in a new proceeding which it instituted, a proceeding which could not possibly have been concluded in time to affect K N's storage operations in the subsequent 1976-1977 winter season. The Court was in no position to read the Commission's mind on this subject or to defeat its purposes.

---

[21] Kansas-Nebraska Natural Gas Company, Inc., 55 FPC 1956 (1976).

[22] 55 FPC at 1956-1957.

[23] See *id.* at 1958.

b. *Policy statements.*

The Colorado Supreme Court disposed of the Commission's policy statements as though they were separate and independent from its certificate orders. This betrays a fundamental misunderstanding of the role of policy statements in advising the regulated pipeline companies as to the conduct the Commission considers to be consistent with their obligations under the Natural Gas Act and certificate orders.[24]

The certificates of public convenience and necessity issued to K N by the Federal Power Commission placed K N under a continuing obligation to operate its facilities in a manner which would assure adequate service to its high-priority firm customers throughout the winter heating seasons. K N's largest storage fields had been authorized primarily to assist K N in protecting such service on a continuing basis.

In policy statements issued in the early 1970s the Commission reminded interstate pipelines that, under their certificates of public convenience and necessity, they had an obligation to provide reliable and adequate service to firm service customers throughout the heating season and that they should operate their storage fields accordingly. Thus in Order No. 431,[25]

---

[24] "A general statement of policy, . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed." Pacific Gas and Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974). "A general statement of policy, however, may not be irrelevant for all purposes. For example, a policy statement establishing initial guideline prices may have some relevance in determining cost trends." (*Id.* at 38, n. 19)

[25] Policy with respect to establishment of measures to be taken for the protection of as reliable and adequate service as present

the Commission adopted a policy statement which directed that "jurisdictional pipeline companies shall take all steps necessary for the protection of as reliable and adequate service as present supplies and capacities will permit during the 1971-72 heating season and thereafter, including adequate injection into storage in anticipation of the heating season." The Commission further directed that "[d]uring the storage injection season *all* natural gas pipelines subject to the jurisdiction of the Commission should make every reasonable effort to fill all storage fields supplied by such pipelines to a capacity sufficient to meet the anticipated heating season demands." 45 FPC at 571 (emphasis supplied). As the Commission was addressing service requirements which might be encountered within seven months, it obviously did not intend that compliance await either the consent of the pipeline's interruptible customers or Commission approval of a curtailment plan (as the Supreme Court of Colorado supposed).[26]

Commission Order No. 498 requested that pipelines "where possible, husband present supplies of natural gas for high priority usage" and suggested a number of steps which might be taken to conserve natural gas.[27] The Court observed: "None of the suggested

---

natural gas supplies and capacities will permit, Docket No. R-418, Order No. 431, 45 FPC 570 (1971). This policy statement was the basis of this Court's decision in FPC v. Louisiana Power & Light Co., *supra*, that pipelines could file curtailment plans with the Commission under Section 4 of the Natural Gas Act.

[26] Opinion at p. 19.

[27] Nation-wide fuel emergency, Docket No. RM74-8, Order No. 498, 50 FPC 1954, 1957-8 (1973).

conservation measures related to curtailment of deliveries."[28] This conclusion is quite obviously at odds with the Commission's purpose as natural gas could not be husbanded in storage for high-priority uses if a pipeline was required either to deliver gas from storage to low-priority, interruptible customers or to pay damages.

The Supreme Court of Colorado asserts that the "storage withdrawal policy has no necessary relationship to . . . the preservation of service to higher priority customers."[29] But that requires an expert understanding of the certificated purpose and nature of K N's storage fields which the Commission and not the state courts possesses. In the circumstances, the court was obliged to refer the issue to the Commission.

c. K N's tariff.

In 1976 K N filed a revised tariff under Section 4 of the Natural Gas Act which made its storage withdrawal interruption plan applicable to its sale-for-resale customers (like Northern) as well as its direct sales customers. The new text provided that "Seller shall not be required to remove gas from storage reservoirs for delivery to consumers served by Seller on an interruptible basis or under interruptible service rate schedules in this Tariff." The tariff change was suspended and became effective on March 14, 1976 while a hearing into its lawfulness was pending.[30]

---

[28] Opinion at p. 20.

[29] *Id.* at 11-12.

[30] A modified form of the text became effective July 1, 1977, after suspension, and pending a hearing on its lawfulness, as part of K N's proposal to utilize eight priority-of-service categories.

Great Western participated actively in the subsequent hearings before the Commission. The Commission never rendered a decision on the lawfulness of the proposed tariff changes, approving instead a settlement which provided a similar tariff provision for the future.

The Supreme Court of Colorado ruled that K N's filing was contrary to its contract obligation to give Great Western access to storage and, therefore, constituted a unilateral contract change, a legal nullity under the *Mobile-Sierra* doctrine inasmuch as it was never approved by the Commission.[31] Great Western never raised the *Mobile-Sierra* defense in the FPC proceedings, so that the agency could timely rule on the question whether it had jurisdiction to hear the matter. It failed to exhaust its administrative remedies. The proper procedure was for Great Western to raise the issue before the Commission and, if it lost at that level, to appeal an adverse judgment to an appropriate court of appeals.[32]

---

[31] Opinion at pp. 26-27. United Gas Pipeline Co. v. Mobile Gas Service Co., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956). *Cf.* United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958) (approving acceptance by FPC of pipeline rate filing and *reversing* Memphis Light, Gas and Water Division, 250 F.2d 402 (D.C. Cir. 1957)).

[32] For cases illustrating judicial review of Commission decisions under the Natural Gas Act and the Federal Power Act on whether a rate filing constituted a "unilateral" change see Tyler Gas Service Company v. Federal Power Commission, 247 F.2d 590 (D.C. Cir. 1957); Public Service Commission of Indiana v. Federal Energy Regulatory Commission, 575 F.2d 1204, 1209-1211 (7th Cir. 1978); Appalachian Power Company v. Federal Power Commission, 529 F.2d 342 (D.C. Cir. 1976) and cases cited at 344, note 22.

Great Western had the opportunity to challenge the legality of the proposed curtailment plan in K N's tariff filing before the Commission. Again, it failed to exhaust its administrative remedies. Instead of insisting on a definitive decision by the Commission, as it had a right to do after an initial decision was issued by the hearing examiner,[33] Great Western acquiesced in a settlement of the case and a termination of the proceeding.[34]

The decision of the Supreme Court of Colorado, insofar as it relates to K N's tariff, constituted an improper and untimely collateral attack on a Commission order.[35]

3. *The need for guidance from this Court.*

This Court stated in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana, supra,* 332 U.S. at 523, that "the matter of interrupting service is one largely related . . . to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states." K N provided service from its interstate system to some 100 direct interruptible industrial customers in the states of Colo-

---

[33] See Minneapolis Gas Co. v. FPC, 294 F.2d 212 (D.C. Cir. 1961).

[34] Kansas-Nebraska Natural Gas Company, Inc., 17 FERC ¶ 61,102, p. 61,208 (1981).

[35] See Montana v. United States, 440 U.S. 147, 152-153 (1979); United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 598 (1948).

rado, Kansas, Nebraska, and Wyoming. One objective of the Natural Gas Act, as the Solicitor of the Commission advised the Colorado courts, is to achieve uniformity of regulation and to avoid the undue discrimination prohibited by Section 4(b) of the Act.[36] This objective cannot be achieved if the courts of one state are free to determine for themselves, without any deference to the views of the Commission, what the service obligations of an interstate pipeline are to local customers.

B. An award of damages for interruptions in interruptible service would create an undue preference and violate the filed rate doctrine where the consumer is not a customer of the interstate pipeline but is served indirectly through a sale-for-resale customer under a tariff on file with the Federal Energy Regulatory Commission (or its predecessor, the Federal Power Commission).

A substantial portion of the damages awarded to Great Western by the Colorado District Court is attributable to interruptions in service by Northern of Great Western's plant at Goodland, Kansas. K N did not serve that plant directly. Service by Northern to the plant was regulated by the Kansas Corporation Commission.

Service by K N to Northern, including service under an interruptible rate schedule, was authorized by the Commission in a certificate of public convenience

---

[36] Section 4(b)(2) provides in pertinent part that no natural-gas company shall "maintain any unreasonable difference in . . . service . . . either as between localities or as between classes of service." 15 U.S.C. § 717c(b)(2).

and necessity issued in 1970.[37] The Commission's order conditioned the certificate upon compliance by K N "with all applicable Commission regulations and particularly" certain specified regulations,[38] among them Section 154.21 which provides:

> "The effective tariff of a natural-gas company shall be the tariff filed pursuant to the requirements of this part, and permitted by the Commission to become effective. No natural-gas company shall directly or indirectly, demand, charge or collect any rate or charge for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or impose any classifications, practices, rules or regulations, different from those prescribed in its effective tariff and executed service agreements on file with the Commission, unless otherwise specifically provided by order of the Commission."

Another incorporated regulation is Section 157.20(e) which provides: "The certificate issued to applicant . . . shall be effective only so long as applicant continues the operations authorized by the order issuing such certificate and in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations and orders of the Commission." This incorporates Section 4(b) of the Natural Gas Act which prohibits the grant of undue preferences or advantages.[39] K N could not provide uninterrupted service

---

[37] Kansas-Nebraska Natural Gas Company, Inc., 44 FPC 218 (1970).

[38] *Id.* at 220 (Ordering Paragraph (B)).

[39] In the proceedings in the Colorado courts K N repeatedly called attention to these provisions of the Natural Gas Act and the rules and regulations of the Commission.

to Northern (for Great Western's benefit at Goodland, Kansas) while interrupting service to its other wholesale customers purchasing gas under the same interruptible rate schedules.

The Colorado District Court held that Great Western was a "third party beneficiary" of the service agreement between K N and Northern on file with the Commission. To provide Great Western with a damage award based on the K N/Northern service agreement, thereby permitting Great Western to stand in Northern's shoes, has the same consequences as a rebate by K N to Northern. The recovery is not based on a violation of the Natural Gas Act, or on a finding that the interruption was due to K N's negligence, imprudence, improvidence or willful misconduct. It is based on the service agreement. The net effect of the Court's award is to leave K N with a different (lower) rate for its services than is provided for in its tariff. Therefore, the award of damages to Great Western by the Colorado courts violates the "filed rate doctrine" and must be annulled. That doctrine was applied in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), a case in which a producer selling to a pipeline sought to obtain by means of a state court judgment in a breach of contract suit a different (higher) rate than was set out in the producer's sales contract on file as a rate schedule with the FERC. The Court observed that "under the filed rate doctrine, when there is a conflict between the filed rate and the contract the filed rate controls." [40]

---

[40] 453 U.S. at 582.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT C. MCHUGH, Esq.
K N Energy, Inc.
P.O. Box 15265
Lakewood, Colorado 80215

B. J. BECKER, Esq.
K N Energy, Inc.
P.O. Box 609
Haskup, Nebraska 68901

JOHN P. FURMAN, Esq.
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JOHN T. MILLER, JR., Esq.
1001 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 331-1630

Attorneys for K N Energy, Inc.

Counsel of Record

May 6, 1985

APPENDIX

APPENDICES

Page

A. Opinion of Supreme Court of Colorado issued January 14, 1985 (No. 82SC22) 1a

B. The Great Western Sugar Company v. Northern Natural Gas Co., *et al.*, 661 P.2d 684 (Colo. App. 1982) 33a

C. Provisions of the Natural Gas Act 57a

D. Regulations of the Federal Power Commission and Federal Energy Regulatory Commission 59a

E. Motion to Dismiss of Kansas-Nebraska Natural Gas Company, Inc. 63a

F. Order of Colorado District Court dated January 31, 1979 Granting Motion of Plaintiff for Partial Summary Judgment Against Kansas-Nebraska 65a

G. Order of Colorado District Court filed May 23, 1979 Denying Plaintiff's Second Motion for Partial Summary Judgment Against Kansas-Nebraska 70a

H. Motion of Kansas-Nebraska Natural Gas Company, Inc. to Refer Issues to the Federal Energy Regulatory Commission 73a

I. Order of Colorado District Court dated June 8, 1979 Denying Motion to Refer Issues to the Federal Energy Regulatory Commission 76a

J. Petition by Kansas-Nebraska Natural Gas Company, Inc. to Supreme Court of Colorado for Writ of Prohibition (No. 79SA269) 78a

K. Order of Supreme Court of Colorado issued June 21, 1979 Denying Writ of Prohibition 88a

APPENDIX A

SUPREME COURT, STATE OF COLORADO

No. 82SC322

January 14, 1985

KN Energy, Inc.,
a Kansas corporation,

Petitioner,

vs.

The Great Western Sugar Company,
a Delaware corporation,

Respondent,

and

Northern Natural Gas Co.,
a Delaware corporation,

Defendant.

CERTIORARI TO THE COLORADO COURT OF APPEALS

EN BANC JUDGMENT AFFIRMED

Bruce D. Pringle
James A. Clark
Baker & Hostetler
Denver, Colorado

William R. Smith
Hershberger, Patterson, Jones & Roth
Wichita, Kansas
John T. Miller
Washington, D.C.

Attorneys for Petitioner KN Energy, Inc.

Hardin Holmes
Kenneth L. Starr
Jeffrey Reiman
Holmes & Starr, P.C.
Denver, Colorado

Attorneys for Respondent The Great Western Sugar Company

John H. Cheatham, III
Washington, D.C.

Attorney for Amicus Curiae Interstate Natural Gas Association of America

JUSTICE DUBOFSKY delivered the Opinion of the Court.

We granted certiorari to review *Great Western Sugar Company v. Northern Natural Gas Company*, 661 P.2d 684 (Colo. App. 1982),[1] in which the Court of Appeals affirmed a district court order granting partial summary judgment on the liability of KN Energy, Inc. (KN) arising from its natural gas supply contract with Great Western Sugar Company (GW), as well as a subsequent jury verdict awarding damages to GW. The Court of Appeals also affirmed a number of the district court's evidentiary rulings. We limited certiorari review to the following issues: (1) whether the district court erred in granting partial summary judgment on liability; and (2) whether the district court erred in excluding from evidence certain expert testimony, a number of Federal Energy Regulatory Commission (Commission) orders,[2] tariffs filed before the Com-

---

[1] For a more detailed statement of the facts underlying the controversy before us, see the Court of Appeals' opinion.

[2] Until October 1, 1977, the Federal Energy Regulatory Commission was known as the Federal Power Commission. We refer to both agencies as "the Commission."

mission by KN, and a number of KN's certificates of public convenience and necessity. We affirm the decision of the Court of Appeals.

KN is a natural gas pipeline company regulated by the Commission under the provisions of the Natural Gas Act. 15 U.S.C. § 717 *et seq.* (1976). Beginning in 1955, KN executed a series of contracts with GW obligating KN to supply the natural gas requirements of GW's sugar processing plants in Ovid and Sterling, Colorado, and Scottsbluff, Nebraska. The initial contract for each site provided that service to GW's boilers and dryers was "interruptible"[3] and that KN

> in its absolute discretion and without liability to Buyer for damages or otherwise shall have the right to and at any time with or without notice may interrupt in whole or in part delivery of natural gas to Buyer as and whenever from time to time Vendor in its sole judgment may deem necessary or expedient for conservation of gas for domestic use or industrial use having prior classification.

This language remained in all KN-GW agreements until March 1973, when KN revised the provision to permit interruptions in order to meet the demands of "users having a higher priority of service."[4]

---

[3] Natural gas service is divided into two categories: "interruptible," permitting cessation of delivery under certain conditions, and "firm," providing for an unconditional delivery obligation. Within the "interruptible" category, gas companies may set a priority among the customers to be interrupted.

[4] The change in contractual language reflects KN's adoption of the Commission's suggested "priority of service" categories for curtailment, set forth in Order No. 467 and discussed in Part I.C.2, *infra*. The adoption of these categories did not change GW's priority-of-service ranking under KN's former classification system.

The agreements between KN and GW also contained a "force majeure" clause, which provided that KN would not be liable for any failure of delivery resulting from any of a series of enumerated supervening circumstances, including the "order or requirement of competent authority . . . ." In addition, beginning in March 1973, KN inserted the following clause into the contracts:

> This agreement and the respective rights and obligations of the parties hereto are subject to all valid and applicable laws and orders, rules and regulations of duly constituted authorities having jurisdiction or control over the parties, KN's facilities and gas supply, or any transaction contemplated hereby.

KN also supplied gas indirectly to a GW sugar plant in Goodland, Kansas, through a service agreement with the People's Natural Gas Division of the Northern Natural Gas Company (People's-Northern). People's-Northern in turn transmitted the gas to GW under a sales agreement. The service agreement between KN and People's-Northern provided for delivery of

> all the natural gas required by Buyer from day to day up to the amount of the Billing Demand plus . . . the Winter Period Demand on a firm basis but in no case is Seller to be required to furnish on any day a volume larger than the then existing Billing Demand plus . . . the Winter Period Demand. . . . Seller also agrees to make deliveries of gas to Buyer in daily volumes in excess of the Billing Demand plus . . . the Winter Period Demand on an interruptible basis when gas and facilities are available for making such deliveries.

Billing Demand plus Winter Period Demand comprised the gas supplied on a firm basis. People's-Northern sold only interruptible gas to GW for its Goodland boilers and dryers. The agreement contained clauses concerning force

majeure and the effect of administrative regulations similar to the clauses contained in the service agreements between KN and GW.

From 1955 until November 1973, KN determined when to interrupt both its direct and indirect gas service to GW by utilizing what the parties refer to as the "historical twenty-four to thirty-six hour analysis." Under this analysis, KN's gas dispatchers estimated anticipated demand for the coming twenty-four to thirty-six hours on the basis of weather forecasts. If, due to the estimated demand, KN would be unable to maintain sufficient pressure in its pipelines to serve its firm customers, KN would cut off gas supply to its interruptible customers, including GW. In estimating its ability to maintain pipeline pressure, KN did not distinguish among its available sources of gas; pressure was maintained by withdrawing gas from both production and storage fields.

On November 7, 1973, KN instituted a new policy for determining when to sever service to interruptible customers. Under this policy, known as the "storage withdrawal interruption policy," gas deliveries to interruptible customers were to be cut off whenever KN withdrew gas from storage, regardless of KN's ability to maintain pipeline pressure by using gas from storage.[5]

---

[5] Before November 7, 1973, when pressure in a line declined due to demand, KN added delivery from storage to delivery from production fields to increase pipeline pressure. If the demand for gas appeared to be greater than the supply even with the added source, under the twenty-four to thirty-six hour policy KN cut off interruptible customers to keep up pipeline pressure. However, after November 7, 1973, under the storage withdrawal interruption policy, KN cut off interruptible customers whenever it added gas withdrawn from storage to its regular production field withdrawal. The effect of the new policy was to make storage field supplies available only to firm customers, who paid rates higher than the rates paid by the interruptible customers for gas.

On November 8, 1973, KN representatives met with GW representatives at the GW offices in Denver. At that meeting, KN proposed that the gas sales contract then in effect be terminated and replaced with a new contract in order to incorporate certain changes in the rate schedule; the KN representatives reassured GW that, other than the rate changes, the proposed new contract would be "identical" to the previous agreement. The KN representatives testified that they notified GW at that time of KN's new policy regarding interruption of service.[6] One of the GW representatives present at the meeting denied being informed of the change in policy. After the meeting GW executed the new contract to be effective on November 14, 1973. With the exception of the rate changes, the contract adopted was identical to the March 1973 contract.

Early in 1978, GW instituted an action for damages against People's-Northern and KN, alleging that the defendants had breached their contractual gas delivery obligations by instituting the storage withdrawal interruption policy,[7] and that the defendants had fraudulently failed to disclose this change in policy. The defendants moved to refer GW's claims to the Commission, asserting that the Commission had primary jurisdiction over such claims. The district court denied the motion.

In November 1978, GW moved for partial summary judgment against KN on the ground that, as a matter of law, KN had breached its contractual obligations for delivery of gas to the Ovid, Sterling and Scottsbluff plants

---

[6] It is unclear which of the two KN representatives present at the meeting actually informed GW of the new policy at the meeting because each testified that it was the other who did so.

[7] Whenever natural gas service was interrupted, GW used more expensive fuel in its boilers and dryers. GW alleged that the fuel oil used during the time at issue in its lawsuit, from November 1, 1973 to March 1, 1979, cost $3.7 million more than natural gas.

by unilaterally changing the standard under which it determined when to interrupt delivery. KN filed a cross-motion for summary judgment, contending that the contract unambiguously permitted KN to exercise its discretion in determining what circumstances required interruption of service; that certain Commission orders, as well as KN's tariffs and certificates of public convenience and necessity on file with the Commission, required KN's change in interruption policy; and that because the policy change was lawful, there was no basis for a claim of fraud. The district court granted GW's motion and denied KN's motion, ruling that the plain language of the contract required KN to adhere to its earlier twenty-four to thirty-six hour historical analysis and that the contract did not allow KN to withhold storage gas from GW. The court also determined that the contract language was consistent with the parties' course of dealing from 1964 until November 1973.

GW filed a second motion for partial summary judgment against KN, arguing that KN's storage withdrawal interruption policy was also in breach of its service agreement with People's-Northern and that KN was liable to GW for the breach because GW was a third party beneficiary of the agreement. The district court ruled that, as a matter of law, the service agreement obligated KN to deliver interruptible gas to Northern as long as it was physically able to do so, that the 1973 policy change regarding interruption resulted in a breach of the agreement, and that GW was a direct beneficiary of the service agreement. However, the court denied the motion for summary judgment, ruling that the factual question of whether KN and People's-Northern intended to confer benefits upon GW or a class of customers that included GW was for the jury to decide.

At trial, the court directed a verdict in favor of People's-Northern on the fraud claim at the close of the plaintiff's

case-in-chief. Following the presentation of evidence, the jury found that KN was not liable on the fraud claim and that People's-Northern was not liable on the contract claim. The jury awarded GW $775,000 in damages arising from the breach of KN's direct gas sales contracts with GW. The jury also found that GW was an intended beneficiary of the service agreement between KN and People's-Northern, and awarded GW $225,000 in damages arising from breach of the agreement. Following the jury verdicts, the court awarded pre-judgment interest and costs to GW, and entered a judgment against KN in the amount of $1,350,229.

The Court of Appeals affirmed the district court's partial summary judgment ruling on the issue of contract liability under the direct contracts, its finding that KN had breached the People's-Northern service agreement, and a number of trial rulings excluding certain evidence. KN now argues that the district court erred in granting summary judgment and finding a breach of the service agreement because (1) an issue of material fact remained as to the parties' intent in entering the November 14, 1973 and subsequent agreements, (2) the district court improperly applied the law governing course of dealing and course of performance, and (3) certain Commission orders, tariffs and certificates of public convenience and necessity required KN's change in interruption policy and immunized KN from contract liability. KN also maintains that the district court erred in excluding from evidence at trial many of the same Commission documents as well as a portion of the expert testimony offered by KN. These contentions are without merit, and we affirm the decision of the Court of Appeals.[8]

---

[8] In addition, KN claims that state court jurisdiction to award damages for nondelivery of natural gas is preempted by federal law, that the state court had no jurisdiction to award damages in this case because of the "filed rate doctrine," that even if the state court were to retain jurisdiction it must apply federal com-

I. SUMMARY JUDGMENT

A. Disputed Issues of Material Fact

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c). Because summary judgment is a "drastic remedy," the absence of dispute as to all issues of material fact must be clearly shown, and all doubts as to the presence of disputed facts must be resolved against the moving party. *Ginter v. Palmer & Co.*, 196 Colo. 203, 205-06, 585 P.2d 583, 584 (1978); *Abrahamsen v. Mountain States Telephone and Telegraph*, 177 Colo. 422, 426, 494 P.2d 1287, 1289 (1972). Under these principles, KN contends that the entry of summary judgment in favor of GW on the issue of direct contract liability and the finding of breach under the service agreement were incorrect inasmuch as there existed a disputed issue of material fact: whether KN had notified GW of the change in interruption policy prior to the parties' execution of the November 14, 1973 sales agreement. KN argues that the disputed fact is material to a determination of the parties' intent regarding KN's obligations under the November 14, 1973 agreement and subsequent agreements.

The record leaves no doubt that the issue of oral notice is disputed. However, the intent of the parties to a written

---

mon law, and that GW failed to exhaust its administrative remedies. None of these matters are fairly raised by the issues upon which which we granted certiorari, and we therefore do not consider them. C.A.R. 53(a)(3); *Vigoda v. Denver Urban Renewal Authority*, 646 P.2d 900, 907 (Colo. 1982). We expressly declined to review the intertwined questions of primary jurisdiction, exclusive federal jurisdiction and federal preemption raised in KN's petition for certiorari.

instrument must be determined primarily from the written terms. *Union Rural Electric Ass'n v. Public Utilities Commission,* 661 P.2d 247, 251 (Colo. 1983); *Radiology Professional Corp. v. Trinidad Area Health Ass'n,* 195 Colo. 253, 256, 577 P.2d 748, 750 (1978). "It is only where the terms of an agreement are ambiguous or are used in some special or technical sense not apparent from the contractual document itself that the court may look beyond the four corners of the agreement in order to determine the meaning intended by the parties." *Pepcol Manufacturing Co. v. Denver Union Corp.,* 687 P.2d 1310, 1314 (Colo. 1984); *see also Union Rural Electric Ass'n,* 661 P.2d at 251; *Radiology Professional Corp.,* 195 Colo. at 256, 577 P.2d at 750. Whether an ambiguity exists, as a matter of law, is for the court to determine. *Pepcol,* 687 P.2d at 1314; *Radiology Professional Corp.,* 195 Colo. at 256, 577 P.2d at 750. In making this determination, the court may consider extrinsic evidence bearing upon the meaning of the written terms, such as evidence of local usage and of the circumstances surrounding the making of the contract. *Pepcol,* 687 P.2d at 1314 n.3; 4 S. Williston, *A Treatise on the Law of Contracts* §§ 601, 609 and 629 (W. Jaeger ed. 1961) (hereinafter "Williston"). However, the court may not consider the parties' own extrinsic expressions of intent. Williston § 611 at 554-55. In ascertaining the intent of the parties here, therefore, we cannot consider extrinsic evidence unless the contract is ambiguous; neither may we consider the oral notice which was KN's expression of intent in our initial determination of whether an ambiguity exists.[9]

---

[9] We do not imply that we necessarily would consider KN's oral notice in interpreting the contract were we to find the contract ambiguous. Although extrinsic evidence is admissible to explain the meaning of an ambiguous agreement, extrinsic evidence may not be used to demonstrate an intent that contradicts or adds to the intent expressed in the writing. *Hayutin v. Colorado State*

In our view, as in the opinions of the Court of Appeals and the district court, the written contractual provisions governing KN's delivery obligations are not ambiguous. The clause concerning interruption of service provides that KN had "absolute discretion" to determine when service shall be interrupted; however, the same clause then states that delivery may be cut off only when "KN is required to do so in order to meet the demands" of its higher priority customers. In interpreting the clause, we must attempt "to harmonize and to give effect to all provisions so that none will be rendered meaningless." *Pepcol*, 687 P.2d at 1313; *Union Rural Electric Ass'n*, 661 P.2d at 251. Reading the clause as a whole, it is apparent that KN's discretion in determining when to sever service was limited to the situations in which continuation of service to interruptible customers such as GW could imperil KN's ability to serve its higher priority customers. KN thus was required to predicate interruption upon an analysis—such as the historical twenty-four to thirty-six hour analysis—designed to determined when its ability to serve higher priority customers would be imperiled.

The provision governing gas delivery under the service agreement between KN and People's-Northern bears a similar meaning. KN argues that because its delivery obligations were limited to "the amount of the Billing Demand plus . . . the Winter Period Demand on a firm basis . . . ," it had unbridled discretion in determining when to sever all service beyond that firm commitment, i.e., all interruptible gas. The same provision, however, also committed KN to delivering interruptible gas whenever "gas and facilities are available for making such deliveries." The clause when read as a whole contemplated a severance o-

---

Dept. of Highways, 175 Colo. 83, 86-87, 485 P.2d 896, 898, *cert. denied* 404 U.S. 991 (1971); *Regan v. Customcraft Homes, Inc.*, 170 Colo. 562, 565, 463 P.2d 463, 464 (1970); 4 S. Williston, *A Treatise on the Law of Contracts* § 629 (W. Jeager 2d ed. 1961).

interruptible service only when physical limitations prevented continuation of service.

The contracts cannot be read to limit KN's sources of supply for interruptible customers to production fields, as KN did under its storage withdrawal interruption policy, which cut off the interruptible customers as soon as storage field gas was needed to maintain pressure in lines normally supplied only with gas from production fields. The storage withdrawal policy has no necessary relationship to the only express condition limiting service to GW: the preservation of service to higher priority customers. We cannot presume that the parties intended to add such an important condition by implication or by silence. *See* 3 *Corbin on Contracts* § 592 at 554-55 (1960).

In *Kansas Nebraska Natural Gas Co. v. Consumers Public Power District,* 179 Neb. 687, 140 N.W.2d 10 (1966), a gas sales contract called for interruptible service up to "the amount of gas [seller] has available after meeting peak load or other priority demands of its customers. . . ." The seller attempted to limit delivery under the contract to gas obtained from sources of supply already in existence at the time the contract was executed. The court held that the limitation could not be reconciled with the express condition on service contained in the contract; to the contrary, the court found that new sources of supply were included in the language requiring delivery of all gas available after higher priority demands had been met. Similarly, in the instant case, the contract included delivery from all sources until delivery to interruptible customers imperiled service to higher priority customers.

Because the contractual provisions governing KN's delivery obligations are not ambiguous, KN's oral expressions of intent (the alleged oral notification of KN's new interruption of service policy) are not material to the determination of the issue of contractual liability on summary judgment. *See Consumers Public Power District,* 140

N.W.2d at 14 (parol evidence may not be received where provisions governing interruptible gas service are unambiguous). Thus, the district court correctly concluded that all interruptions predicated upon withdrawal from storage, rather than upon an inability to serve higher priority customers, were in breach of contract. The district court's entry of summary judgment on the issue of direct contractual liability and its finding of breach under the service agreement were proper.

B. Course of Dealing and Course of Performance

In granting summary judgment, the district court also found that the parties' course of dealing from 1955 to 1973 was consistent with and buttressed the express terms of the agreement because under the historical twenty-four to thirty-six hour analysis KN interrupted service only when delivery to higher priority customers was imperiled. KN asserts that the parties' course of conduct prior to 1973 is irrelevant to the interpretation of the 1973 contracts. By 1973, KN contends, conditions in the natural gas industry had changed radically; a national gas shortage had arisen, and the Commission had issued a number of orders requesting that pipeline companies conserve natural gas. Only the parties' course of performance under the 1973 contracts, KN maintains, is a true indication of their intent under such changed conditions. KN concludes that the district court should have interpreted the contract terms in light of KN's implementation of, and GW's acquiescence in, the new storage withdrawal interruption policy after 1973.

Under the provisions of the Uniform Commercial Code as adopted in Colorado,[10] the parties' course of dealing

---

[10] A contract for the delivery of natural gas is a sale of goods within the meaning of Article 2 of the U.C.C., § 4-2-101 *et seq.*, 2 C.R.S. (1973). *See Oskey Gasoline and Oil Co. v. OKC Refining*, 364 F. Supp. 1137, 1141 n.2 (D. Minn. 1973).

prior to execution of the contract always may be considered in interpreting the express terms of the contract in order that the true understanding of the parties to the agreement may be determined, whether or not the express terms of the agreement are found to be ambiguous. § 4-2-202(a), official comment 1(c), 2 C.R.S. (1973); *Amerine National Corp. v. Denver Feed Co.*, 493 F.2d 1275, 1278 (10th Cir. 1974). Prior dealings are relevant and are generally the "best possible guide" to the parties' true intent. *Nahring v. City and County of Denver*, 174 Colo. 548, 552, 484 P.2d 1235, 1238 (1971) (quoting *Thompson v. Sweet*, 91 Colo. 552, 17 P.2d 308 (1932)). Therefore, the intent evidenced by such conduct is presumed to have been incorporated into the written contract unless the intent evidenced by the conduct has been "carefully negated" by the written terms. § 4-2-202, official comment 2. In the present case, the district court was justified in considering the intent manifested by the parties' eighteen year course of dealing under the twenty-four to thirty-six hour historical analysis.

The parties' course of performance following execution of the contract is also relevant to the interpretation of the agreement. § 4-2-202(a). Course of performance may be used as an aid to interpretation whenever one party accepts repeated performance by the other party with knowledge of the nature of that performance and an opportunity to object to it. § 4-2-208, 2 C.R.S. (1973). Even assuming that these conditions were met here,[11] and that the parties' post-1973 course of performance could be considered, the district court's interpretation of the agreements at issue remains proper. Although a court must strive to harmonize the express terms of an agreement with the subsequent course of performance under that agreement, the express

---

[11] As noted above, GW denies knowledge of KN's institution of its new interruption policy.

terms control where harmony cannot be found. § 4-2-208 (2); *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129, 136 (5th Cir.), *cert. denied* 444 U.S. 938 (1979). The court's goal is to give effect to the parties' intention as of the time the contract was made, Williston § 607 at 379; therefore, a course of performance may explain but not contradict the express terms of the writing. The parties' post-1973 course of performance cannot alter the intent expressed in the contract here.

Here, moreover, KN drafted the 1973 contract without materially changing the provisions governing interruption of service, despite the fact that KN was aware at the time both of the meaning with which the contractual provisions had been invested by an eighteen year course of dealing, and of the changed circumstances that purportedly necessitated abandonment of that course of dealing. KN's failure to alter the contract language in 1973 renders doubtful its assertion that it intended to change the meaning of the contractual language. *See Oskey Gasoline and Oil Co. v. OKC Refining*, 364 F. Supp. 1137, 1142 (D. Minn. 1973) (where party that wishes to change course of dealing drafts a new written contract, it must demonstrate intent to do so by changing contractual language). Under these circumstances, KN's post-1973 course of performance is a unilateral breach of contractual terms rather than an expression of the parties' mutual intent at the time the contract was made.

We hold that the district court properly enforced the express terms of the contract in light of the parties' course of dealing and course of performance.

C. The Effect of Commission Orders, Tariffs and Certificates

KN next argues that certain Commission orders, as well as certain of KN's tariffs and certificates of public convenience and necessity on file with the Commission, modified the contractual provisions concerning interruption of

service, both by operation of law and by operation of the contractual provision incorporating administrative orders and regulations into the contracts. We examine the effect of certificates, orders and tariffs separately.

1. Certificates of Public Convenience and Necessity

Under section 7 of the Natural Gas Act, no pipeline company may transport natural gas or construct natural gas facilities unless the Commission first issues a certificate of public convenience and necessity. 15 U.S.C. § 717f(c) (1984 Supp.). Commission regulations provide that, once such a certificate has been issued, it remains effective "only so long as the applicant continues the operations authorized by the order issuing such certificate. . . ." 18 C.F.R. 157.20(e) (1984). KN argues that the conditions attached to its certificates in the issuing orders required the adoption of the storage withdrawal interruption policy, and that the conditions superseded its contractual obligations both by operation of law and by the contractual language incorporating into the agreement all applicable "orders, rules and regulations" of authorities having jurisdiction over KN's operations. We need not decide whether certificate conditions supersede the contractual obligations in this case, because we determine that none of the certificate conditions to which KN points are inconsistent with KN's contractual delivery obligations.

KN first notes that the order permitting it to establish pipeline service to GW's plant at Ovid forbids KN from inaugurating firm service to any customer then served on an interruptible basis. 12 F.P.C. 505, 510 (1953). The condition in the order is consistent with a contract that prevents KN from implementing its storage withdrawal interruption policy; the dispute in this case focuses not on whether the contract permits interruptible service, but rather on the manner in which interruptions are to be implemented.

KN also relies on the certificate conditions for its service to Northern at Goodland, Kansas. The order granting the certificate incorporated by reference the conditions contained in KN's application for the certificate. 44 F.P.C. 218, 220 (1970). The application incorporated a rate schedule for interruptible gas, which provided that "service rendered under this rate schedule shall be subject to curtailment or interruption upon notice given by Seller to Buyer at least four hours in advance of its effective hour. . . ." Like the condition attached to the Ovid certificate, this condition specifies only that service may be interruptible; it does not address the manner in which interruptions are to be determined.

Finally, KN relies heavily on the order granting the certificate for its Big Springs storage field. KN directs our attention to the Commission's recognition in the order that "KN does not withdraw gas from underground storage to serve interruptible industrial customers." 55 F.P.C. 1956, 1958 (1976). This statement, however, merely recognized KN's unilaterally-imposed policy and was not made a condition to the issuance of the Big Springs certificate. Rather, the Commission made the statement while considering a petition to intervene filed by one of KN's customers, who contended that the establishment of a new storage field was incompatible with KN's previously filed application for permission to abandon service to that customer. The Commission severed the issue from the certificate proceeding and redocketed it for consideration in subsequent abandonment and curtailment hearings. The Commission consolidated in the same hearings its consideration of the lawfulness of KN's newly-filed curtailment plan. 55 F.P.C. at 1959. The curtailment plan included KN's storage withdrawal interruption policy. (*See* discussion of Docket No. RP76-90 in Part I.C.3, *infra*). Because the Commission explicitly postponed consideration of the lawfulness of KN's storage policy, its recognition of the policy earlier in the same order cannot be construed as approval of the policy.

2. Commission Orders

The Commission has jurisdiction to regulate "the transportation of natural gas in interstate commerce. . . ." 15 U.S.C. § 717(b) (1976). Its grant of jurisdiction empowers the Commission to issue orders requiring pipelines to design plans for the curtailment of natural gas delivery during times of shortage. *FPC v. Louisana Power and Light Co.*, 406 U.S. 621 (1972). The Commission has exercised this power on a number of occasions.

Responding to a growing shortage of natural gas in the early 1970's, the Commission issued Order No. 431, designated a "statement of general policy." 45 F.P.C. 570 (1971). The order stated that pipeline companies "should make every reasonable effort to fill all storage fields . . . to a capacity sufficient to meet the anticipated heating season demands." 45 F.P.C. at 571. The order further required that, where curtailment of deliveries would be necessary in order to carry out this policy, the pipeline affected should file a tariff sheet setting forth a curtailment plan. 45 F.P.C. at 572. The order concluded, "Such tariffs, *if approved by the Commission,* will control in all respects notwithstanding inconsistent provisions in sales contracts. . . ." *Id.* (emphasis added).

Two years later, the Commission responded to the continuing natural gas shortage with Orders Nos. 467, 49 F.P.C. 85 (1973), and 467-B, 49 F.P.C. 583 (1973), which suggested an order of priority for the curtailment of natural gas during periods of shortage. These orders too were designated as policy statements and were "not intended to initiate a proceeding or to provide a binding rule without further proceedings directed towards curtailment problems on specific pipelines." 49 F.P.C. at 583. In subsequent curtailment proceedings, the Commission noted, individual curtailment plans would be judged according to the specific circumstances of the pipeline involved. 49 F.P.C. at 584-85.

Later in 1973, the Commission issued Order No. 498, which requested that pipelines "husband present supplies of natural gas for high priority usage," and suggested a number of steps that might be taken to conserve supplies of natural gas. 50 F.P.C. 1954, 1957 (1973). None of the suggested conservation measures related to curtailment of deliveries. *Id.*

KN contends that this series of orders required implementation of its storage withdrawal interruption policy and superseded any contractual obligations to the contrary. KN notes that every order issuing a certificate of public convenience and necessity, as well as a Commission regulation, 18 C.F.R. § 157.20(e), condition the continued validity of KN's certificates upon compliance with all applicable Commission orders, rules and regulations. KN also argues that this series of orders was incorporated into the contract by reference. We disagree.

Although Order No. 431 permits curtailment plans aimed at preserving supplies of natural gas in storage to supersede contractual provisions to the contrary, the order provides that such plans may supersede contractual provisions only "if approved by the Commission. . . ." Approval may be granted only through proceedings under sections 4 or 5 of the Natural Gas Act, 15 U.S.C. §§ 717(c) and 717(d) (1976), to determine whether the plans are just, reasonable, and nondiscriminatory. *Louisiana Power and Light*, 406 U.S. at 642-47; *Hercules, Inc. v. FPC*, 552 F.2d 74, 76-77 (3d Cir. 1974); *State of Louisiana v. FPC*, 503 F.2d 844, 867 (5th Cir. 1974); *American Smelting and Refining Co. v. FPC*, 494 F.2d 925, 934-35 (D.C. Cir.), *cert. denied* 419 U.S. 882 (1974). Thus, the order has no binding effect by itself and is a policy statement that does not mandate or approve KN's storage withdrawal interruption policy or any other particular curtailment plan. *Hercules*, 552 F.2d at 77.

Orders Nos. 467 and 467(b) similarly are policy statements rather than mandatory orders. *General Motors Corp.*

v. FERC, 613 F.2d 939, 945 (D.C. Cir. 1979); *Hercules*, 552 F.2d at 77; *Pacific Lighting Service Co. v. FPC*, 518 F.2d 718, 719 (9th Cir.), *cert. denied* 423 U.S. 1000 (1975); *Pacific Gas and Electric Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974). Like Order No. 431, these orders envision further proceedings for the approval or rejection of individual curtailment plans. Thus, "[a]ny abrogation of contractual commitments will occur only after individual curtailment plans have been filed and approved by the Commission." *Pacific Gas and Electric Co.*, 506 F.2d at 42.

Order No. 498 is a nonmandatory policy statement as well. It "requests" that gas be husbanded in storage for high priority use, but it does not specify particular curtailment measures. Like the other orders, Order No. 498 has no effect by itself on KN's contractual delivery commitment. Under all of the orders cited by KN, its contract obligations can be altered, if at all, only after individual curtailment plans have been approved. We therefore turn next to the curtailment plans filed by KN.

3. KN's Tariffs

Pipeline companies subject to Commission jurisdiction are required to submit to the Commission a tariff sheet showing rates charged for the transportation or sale of natural gas, along with the classifications, practices, and regulations affecting such rates and charges. . . ." 15 U.S.C. § 717c(c) (1976). The tariff becomes effective automatically thirty days after filing. 15 U.S.C. § 717c(d). However, the Commission, upon complaint or upon its own motion, may suspend the operation of the tariff for five months while it conducts a hearing to determine whether the provisions of the tariff are just, reasonable and nondiscriminatory. 15 U.S.C. § 717c(d). At the close of the five month period, the tariff becomes effective whether or not the Commission has made its determination. *Id.* Once a tariff has become effective, the Commission may find it unlawful retroactive-

ly. *Id.* In addition, at any time after a tariff becomes effective, the Commission may initiate proceedings to determine its lawfulness. 15 U.S.C. § 717d (1976).

On August 29, 1975, KN filed a tariff sheet that contained a curtailment plan incorporating the clause: "Seller shall not be required to remove gas from storage reservoirs for delivery to consumers served by Seller on an interruptible basis or under interruptible service rates schedules in this Tariff." The tariff filing was suspended for the statutory period of five months and became effective on March 14, 1976, while a hearing into its lawfulness was pending in Docket No. RP76-90. On June 25, 1976, GW was permitted to intervene. On December 27, 1976, KN filed a revised tariff in RP76-90 setting forth eight priority-of-service categories. The revised tariff retained the provision governing removal of gas from storage, but substituted the phrase "consumers in step one through step five" for the phrase "consumers served by seller on an interruptible basis." All of GW's interruptible fuel service fell within steps one through five. After a first round of hearings, the revised tariff was permitted to become effective pending a final determination of its lawfulness.

In an initial decision in the second round of hearings on the tariff's lawfulness, a Commission Administrative Law Judge (ALJ) held that the tariff provision permitting interruption of service in order to preserve storage violated section 4 of the Natural Gas Act because the curtailment of service to existing customers in order to permit increased service to new or existing customers was unjust, unreasonable, and unduly discriminatory. 6 F.E.R.C. ¶ 63,055 (1979). The ALJ also held that such interruptions constituted an abandonment, in circumvention of the requirements of section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b). On November 2, 1981, the Commission approved a settlement terminating the proceeding in Docket No. RP76-90.

17 F.E.R.C. ¶ 61,102 (1981). The agreement included the following provision:

> Seller shall not be required to remove gas from gas storage reservoirs for delivery to consumers in priority five served by Seller or Buyer, but may utilize gas in storage to make such deliveries when, by reason of storage inventories and prospective withdrawals the withdrawals of gas from storage will not, in the sole judgment of Seller, impair its ability to supply the requirements of consumers, classified in priority one, priority two, priority three, and priority four, during the succeeding twelve month period.

Under the agreement priority five included the same categories of customers included in the earlier steps one through five of the 1975 tariff. The Commission found the settlement provision to be just and reasonable under section 4 of the Natural Gas Act, but refrained from passing on the lawfulness of the provisions contained in the earlier 1975 and 1976 tariffs.

The effect of the tariff filings on the contractual provisions at issue is governed by the United States Supreme Court decisions in *United Gas Pipeline Co. v. Mobile Gas Service Co.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). In *Mobile*, a pipeline company filed a tariff containing a rate schedule different than the rate schedule contained in its existing service contract. The Commission permitted the tariff to become effective after thirty days under section 4(d) of the Natural Gas Act. 15 U.S.C. § 717c(d). The Court held that the filing did not permit the pipeline company to abrogate its contractual obligations. According to the Court, "the Act expressly recognizes that rates to particular customers may be set by individual contracts." 350 U.S. at 338. Section 4(d) does not sanction unilateral changes in contracts; rather, it merely provides that the Commission be notified

of contractual changes through tariff filings in order to facilitate subsequent Commission supervision of these contracts. *Id.* at 339. A tariff filing, the Court found, is the unilateral act of the natural gas company and does not become the order or act of the Commission, even though it becomes automatically effective. *Id.* at 342. Such unilateral action, the Court concluded, is legally ineffective:

> Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity, and we find no basis in the language of section 4(d) for inferring that the mere imposition of a filing-and-notice requirement was intended to make effective action which would otherwise be of no effect at all.

Id. at 339.

In *Sierra*, the Court reached the same conclusion concerning "substantially identical" provisions of the Federal Power Act. 350 U.S. at 350-52. The Court further held that the unilateral rate changes did not supersede inconsistent contractual terms even though the Commission specifically found the tariff lawful after hearings. *Id.* at 352-53. Rates that abrogate existing contracts may only be found lawful, the Court held, if the Commission first finds that the existing contractual rate is unjust, unreasonable, discriminatory or preferential. *Id.* at 353-55.

We believe that the *Mobile-Sierra* rule applies to tariff provisions, other than rate schedules, that have not received Commission approval. Like rate schedules, curtailment plans contained in tariff filings are not lawful merely because they become effective after passage of the statutory period; the legality of the plans remains an open question until the Commission conducts hearings and issues a determination under either section 4 or section 5 of the Natural Gas Act. *Hercules*, 552 F.2d at 87. At least initially, the plans are unilateral actions on the part of the natural gas

company and a legal nullity. *Mobile,* 350 U.S. at 339. Moreover, the Court in *Mobile* found that its conclusion was justified by the Natural Gas Act's purpose of "preserving the integrity of contracts. . . ." 350 U.S. at 344. "The basic thrust of *Mobile* is that the NGA did not displace but only superimposed federal regulation on private contractual arrangements." *Pennzoil Co. v. FERC,* 645 F.2d 360, 373 (5th Cir. 1981), *cert. denied* 454 U.S. 1142 (1982). The stability and integrity of contractual terms governing delivery conditions are as worthy of protection as contractual rate schedules under the *Mobile-Sierra* rule. Therefore, a natural gas company may not unilaterally change the contractual provisions governing interruptible delivery merely by filing a tariff.[12]

In the present case, the 1975 and 1976 storage withdrawal provisions were never judged lawful by the Commission. While the Commission found the interruption provision contained in the 1981 settlement agreement to be just and reasonable, it explicitly refrained from a similar finding regarding the earlier tariffs under which KN was operating throughout the period for which GW sought damages. The tariff provisions remained the unilateral action of KN. Although the contract explicitly incorporated the "orders, rules and regulations of duly constituted authorities having jurisdiction or control over the parties . . . ," under the reasoning of *Mobile,* the tariff filing never became an "order" of the Commission, *Louisiana Power and Light*

---

[12] The effect of Commission approval of a tariff filing containing a curtailment plan on an existing contract is not before us. We note that it is an open question whether the Commission may approve a curtailment plan that abrogates contractual delivery commitments without first finding, as required by *Sierra,* that the contractual terms adversely affect the public interest. One court has indicated in *dicta* that the *Sierra* requirement must be met. *International Paper Co. v. FPC,* 476 F.2d 121, 127-28 (5th Cir. 1973).

Co. v. FERC, 587 F.2d 671, 676 (5th Cir. 1979), and the tariff did not affect the contract.[13]

Moreover, quite apart from its legal status, the tariff filing had no effect on the contractual terms because the filing was not inconsistent with the terms of the contract. The filing merely stated that KN was not required to withdraw gas from storage in order to serve its interruptible or lower priority customers. The tariff, however, did not forbid KN from withdrawing storage gas for use by interruptible customers. Under the tariff, KN retained the freedom to make any agreement it wished concerning withdrawal of gas from storage. By entering into a contract with GW that did not permit it to withhold storage gas from GW, KN acted in a manner consistent with the tariff provision.

We conclude that nothing in KN's certificates or tariffs, or in the Commission's relevant orders, superseded or modified the unambiguous terms of KN's contract with GW.

---

[13] Even had the tariff been considered by the Commission, the United States Supreme Court has held that "the existence of an actual shortage of gas forms the factual predicate necessary to the Commission's assertion of authority under its transportation jurisdiction, § 1(b) of the Act, 15 U.S.C. § 717(b), to approve the curtailment of gas already contracted for." *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976). In the first phase of Docket No. RP76-90, the Commission found that KN's tariffs contained a curtailment plan and should be judged by the criteria applicable to such plans. 58 F.P.C. 2890, 2898 (1977). KN never asserted that it suffered from a shortage of gas. KN's curtailment plan did not require that a shortage arise before the storage policy would go into effect. During both the first and second phases of the proceedings in Docket No. RP76-90, the ALJ found that KN was not suffering from a shortage of natural gas, and did not expect a shortage, if at all, for years to come. The necessary factual predicate for approval of a curtailment plan for gas already subject to contract was lacking in RP76-90.

II. EVIDENTIARY RULINGS

A. Exclusion of Certificates, Orders and Tariffs

At trial, the court excluded from evidence as irrelevant Commission orders concerning curtailment, the certificates of public convenience and necessity governing KN's storage and pipeline operations, and the 1975 and 1976 KN tariff sheets. Rulings on the relevancy of proffered evidence are within the sound discretion of the trial court and will not be disturbed on review absent an abuse of discretion. *People v. Lowe,* 660 P.2d 1261, 1264 (Colo. 1983); *Publix Cab Co. v. Colorado National Bank,* 139 Colo. 205, 232, 338 P.2d 702, 716 (1959). In addition, evidentiary rulings may constitute reversible error only when they affect a "substantial right" of the objecting party. C.R.E. 103(a).

KN argues that the proffered exhibits were relevant to the issue of damages and that their exclusion deprived it of a fair trial on damages. In support of its contention, KN again argues that the documents replaced the contractual standard for interruption with a binding governmental standard. This issue was resolved, however, when the trial court granted partial summary judgment in favor of GW on the issue of liability based on the contractual standard for interruption. Therefore, the only facts material to the determination of damages were whether interruptions had occurred, and whether such interruptions resulted from the application of an interruption standard that was in breach of the contractual standard. KN's exhibits, offered for the purpose of reinterpreting the contract, were not addressed to any of these material facts, and their exclusion was proper. C.R.E. 401.

B. Exclusion of Expert Testimony

KN also challenges the exclusion portions of its expert witness' testimony. KN called W.R. Chaney, a consulting engineer, to testify to his conclusion that a number of the

interruptions sustained by GW were caused by KN's physical inability to deliver gas and would have occurred even under the historical twenty-four to thirty-six hour analysis. In support of this conclusion, Chaney first discussed what he termed the "nominal throughput" analysis. Under his analysis, Chaney projected the amount of gas KN had available for delivery over the long term, and compared this amount to the natural gas requirements of all of KN's customers. The court excluded the testimony, ruling that physical inability to deliver gas could be demonstrated only by application of the short term twenty-four to thirty-six hour projections required by the contract. We agree with the court's ruling.

The contract contemplated application of a short term analysis to determine pipeline capacity each day. Conclusions based upon a long term analysis could not demonstrate that any interruption was not in breach of contract. The district court properly excluded the expert's conclusions as irrelevant.

Chaney then presented a number of short term analyses in an attempt to comply with the court's ruling. First, Chaney examined KN's daily records for the period in question to compare the amount of gas available in KN's production and storage fields against the amount of gas actually sold on a given day. Where more gas was available than was sold, Chaney hypothetically withdrew gas from storage in order to satisfy any interruptions that occurred on those days. Chaney estimated that as the amount of gas available from storage was depleted over time, there would have been sixty-one days in which KN would have been physically unable to serve its interruptible customers from storage. The court ruled the testimony inadmissible because Chaney's analysis did not distinguish among interruptible customers in determining whether gas would have been available to GW on any given day; this analysis was contrary to undisputed evidence that KN

interrupted its power plant customers before it interrupted GW.

Chaney then performed the same analysis again, this time including an assumption that the power plant customers were interrupted before GW was interrupted. Chaney concluded that there were fourteen days on which delivery to KN would have been physically impossible. GW counsel objected on the ground that the analysis was contrary to evidence that gas could have been injected into storage throughout the period, and that Chaney's assumption of storage depletion was incorrect. The court sustained the objection.

Chaney next attempted to apply a twenty-four to thirty-six hour analysis as required by the contract, but did so by assuming certain hypothetical weather conditions. The court ruled that this testimony was inadmissible because it was contrary to earlier testimony that dispatchers relied upon actual and not hypothetical weather conditions in applying the twenty-four to thirty-six hour analysis. Chaney then applied the twenty-four to thirty-six hour analysis on the basis of actual weather conditions; his testimony again was excluded on the ground that his analysis did not distinguish among classes of interruptible customers.

The district court rulings were correct. Although expert testimony need not be based upon facts admissible in evidence, the facts relied upon must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." C.R.E. 703. Facts that are contrary to the undisputed evidence cannot be reasonably relied upon by experts. *See High v. Industrial Commission,* 638 P.2d 818, 820 (Colo. App. 1981) (expert opinion based on facts contrary to the evidence "has no evidential efficacy"); *Merit Motors, Inc. v. Chrysler Corp.,* 569 F.2d 666, 673 (D.C. Cir. 1977) (stating in dicta that, under identical federal rule, expert testimony may not

be based upon unsupported assumptions); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 1313, 1330 (E.D. Pa. 1980) (under identical federal rule, court may consider whether facts relied upon by expert are supported by the evidence). Expert opinions, whether or not based on evidence admitted at trial, are admissible only when they "will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." C.R.E. 702. An expert opinion based on facts contrary to the evidence cannot be helpful in understanding the evidence.[14] Here, the district court correctly predicated its evidentiary rulings on this principle.

Following these rulings, KN offered to prove through Chaney that delivery of gas to GW would have been physically impossible on certain days based upon a twenty-four to thirty-six hour projection, taking into account actual weather conditions and the actual priorities of interruption followed by KN. The trial court refused to receive the evidence because the facts underlying this "actual conditions" analysis had not been made available to GW in a timely fashion.

The record reveals a history of KN's incomplete and untimely compliance with discovery procedures. On September 28, 1978, GW submitted an interrogatory asking that KN identify its expected expert witnesses, the substance of their testimony, and the facts upon which their opinions would be based. On October 30, 1978, KN refused to answer the interrogatory because it was "premature." On April 27, 1979, KN supplemented its answer by identifying W.R. Chaney as an expert witness and stating that

---

[14] The former rule in Colorado was that "an opinion by an expert cannot be based on facts not in evidence." *Liber v. Flor*, 160 Colo. 7, 16, 415 P.2d 332, 337 (1966). Under C.R.E. 703, the facts upon which an expert relies need no longer be admissible in evidence, but the rule of *Liber* retains its vitality to the extent that it forbids reliance upon facts contrary to the stated evidence.

Chaney was expected to testify to KN's physical inability to deliver gas under both hypothetical and actual weather conditions during the period in issue. The answer further stated that Chaney's opinion was to be based upon a review of KN's daily records. At his deposition on June 5-7, 1979, Chaney testified that he had begun working for KN in October 1978 and that he had selected his analysis in December 1978 or January 1979. He also set forth the conclusions he had reached under many of the analyses set forth above, but he made no mention of the final "actual conditions" analysis ultimately excluded at trial. At Chaney's deposition, KN counsel promised to supply GW with copies of all the work papers upon which Chaney had relied in reaching his conclusions.

On June 18, 1979, when the work papers still had not been provided, the district court ruled that KN had failed to fulfill its discovery obligations under C.R.C.P. 26 because KN had failed to name Chaney as an expert witness in its first interrogatory response, had failed to reveal his identity and analysis in a timely supplementary answer, and had failed when that supplementary answer was finally given to set forth the specific conclusions Chaney had reached and the specific facts he had relied upon. After KN's counsel once again promised to supply Chaney's work papers, the court set June 21 for a renewed deposition of Chaney. At the June 21 deposition, Chaney disclosed that he had performed an interruption analysis based upon the contract standard under actual conditions, but was unable to reveal the conclusions he drew from his "actual conditions" analysis. The conclusions, he stated, were in his work papers in Kansas City. These papers, along with many others, were given to GW for the first time in the days following the June 21 deposition, some arriving as late as July 2, the opening day of trial. On July 2, the court ruled that it would not receive any testimony based upon work papers received by GW after June 21, and, on this basis, excluded Chaney's "actual conditions" analysis.

The district court's imposition of the sanction excluding evidence was an appropriate exercise of its discretion. Under C.R.C.P. 26(b)(4)(A)(i), a party may discover through interrogatories the identity of all proposed expert witnesses, the subject matter upon which they will testify, the substance of the facts and opinions to be contained in their expected testimony, and a summary of the grounds for their opinions. KN's failure to identify Chaney as a possible expert witness in its first interrogatory response violated the rule. In addition, C.R.C.P. 26(e)(1)(B) requires that all responses to interrogatories concerning expert witnesses be seasonably supplemented. KN failed to identify any of Chaney's analyses until April 1979, months after he had been hired and his analysis chosen, and failed to identify at any point prior to Chaney's first deposition the exact conclusions and facts he relied upon in his analyses. KN's violation of the rule was compounded by its failure to identify Chaney's "actual conditions" analysis until June 21, and its accompanying failure to supply the relevant work papers until a few days before trial.

When Rule 26 is flouted, the trial court has the inherent discretion to levy appropriate sanctions. *Murphy v. Magnolia Electric Power Ass'n,* 639 F.2d 232, 234 (5th Cir. 1981); *Phil Crowley Steel Corp. v. Macomber, Inc.,* 601 F.2d 342, 344 (8th Cir. 1979); *Holiday Inns, Inc. v. Robertshaw Controls Co.,* 560 F.2d 856, 857 (7th Cir. 1977); *Dudley v. South Jersey Metal, Inc.,* 555 F.2d 96, 99 (3d Cir. 1977); *Davis v. Marathon Oil Co.,* 528 F.2d 395, 404 (6th Cir. 1975), *cert. denied* 429 U.S. 823 (1976); *Price v. Lake Sales Supply R.M., Inc.,* 510 F.2d 388, 395 (10th Cir. 1974); *Lewis v. Darce Towing, Inc.,* 94 F.R.D. 262, 25-66 (W.D. La. 1982); *Tabatchnick v. G.D. Searle and Co.,* 67 F.R.D. 49, 55 (D. N.J. 1975); *White v. Citizens National Bank of Boone,* 262 N.W.2d 812, 816 (Iowa 1978); *see also Wood v. Rowland,* 41 Colo. App. 498, 592 P.2d 1332 (1978) (court may levy sanctions for failure to disclose expert testimony in accordance with local court rules). In determining

whether sanctions were appropriate in the cited cases, the courts considered some or all of the following factors: the extent of prejudice to the opposing party from nondisclosure, whether the prejudice could be cured, the importance of the evidence to the nondisclosing party, whether the nondisclosing party had a valid excuse for failure to disclose in a timely fashion, whether nondisclosure violated an existing court order, and whether nondisclosure would adversely affect the trial process. *Id.* The courts are split over whether the bad faith of the nondisclosing party may be considered. *Compare, e.g., Dudley,* 555 F.2d at 99 *with White,* 262 N.W.2d at 816.

We need not decide whether bad faith should be considered in determining the appropriate sanction because application of all of the other factors overwhelmingly supports the exercise of the district court's discretion in imposing sanctions here. KN's failure to supply work papers until after the June 21 deposition prejudiced GW by depriving it of an opportunity to examine Chaney concerning the basis for his opinion prior to trial. Because the work papers were not received until just prior to trial, there was no opportunity for GW to cure the prejudice. Although the district court did not specifically order that the work papers be supplied, it ordered the June 21 deposition on the understanding that KN would supply the supporting documentation. Thus, KN's actions defied an understanding with the court, if not a direct order. KN presented no excuse for its failure to supply the papers over the many months it had to do so. Moreover, a failure to exclude evidence based upon the undisclosed work papers would have adversely affected the trial process by requiring a continuation to compensate for GW's missed preparation. Although the excluded evidence was undoubtedly of some importance to KN, the sanction of exclusion was well within the trial court's discretion in light of KN's repeated failure to respect the discovery process.

The judgment of the Court of Appeals is affirmed.

APPENDIX B

COLORADO COURT OF APPEALS, DIV. I.

Nos. 80CA0081, 80CA0236.

THE GREAT WESTERN SUGAR COMPANY, a Delaware corporation, *Plaintiff-Appellee and Cross-Appellant,*

v.

NORTHERN NATURAL GAS CO., a Delaware corporation, *Defendant,*

KANSAS-NEBRASKA NATURAL GAS CO., INC., a Kansas corporation, *Defendant-Appellant and Cross-Appellee.*

June 17, 1982.

Rehearing Denied July 15, 1982.

Certiorari Granted March 21, 1983.

Gas customer brought action alleging breach of contract and fraud on part of natural gas pipeline company in connection with interruptions in service. The District Court, Logan County, Waino W. Johnson, J., entered judgment in favor of gas company, and both parties appealed. The Court of Appeals, Tursi, J., held that: (1) trial court did not err in declining to refer issues to Federal Energy Regulatory Commission under doctrine of primary jurisdiction; (2) evidence supported finding that gas company breached its contracts with customer; (3) customer was a direct, not an incidental beneficiary of service agreement between defendant gas company and another gas company, and obligation of former was to deliver gas to customer except when it lacked inadequate gas supply to do so; (4) tariff provision was filed uni-

laterally by gas company and accordingly could not relieve it of contract liability; (5) trial court did not abuse its discretion in excluding much testimony of gas company's expert; but (6) award of prejudgment interest at rate of ten percent was in error.

Affirmed in part, reversed in part, and remanded.

• • •

Holmes & Starr, Hardin Holmes, Kenneth L. Starr, Jeffrey Reiman, George E. Clough, Denver, for plaintiff-appellee and cross-appellant.

Baker & Hostetler, Bruce D. Pringle, James A. Clark, Denver, Hershberger, Patterson, Jones & Roth, Richard Jones, William R. Smith, Wichita, Kan., for defendant-appellant and cross-appellee.

TURSI, Judge.

In this action for breach of contract and fraud, Great Western Sugar Company (GW) sought damages from Kansas-Nebraska Natural Gas Company (KN) and Peoples Division of Northern Natural Gas Company (Northern) in connection with interruptions in natural gas service occurring between November 1973 and March 1979 to GW's sugar beet processing plants in Ovid and Sterling, Colorado, in Scottsbluff, Nebraska, and in Goodland, Kansas. Jury verdicts totalling $1,000,000 were returned for GW against KN. Judgment was entered in the amount of the jury verdicts plus $350,229 in prejudgment interest. Northern was found not liable and that judgment has not been appealed. KN appeals the judgment against it, and GW cross-appeals as to the amount of damages awarded against KN. We affirm in part and reverse in part.

KN is a natural gas pipeline company operating an interstate pipeline system which serves Wyoming, Colorado, Nebraska, and Kansas. It is a jurisdictional pipeline subject to regulation by the Federal Energy Regulatory

Commission (FERC), formerly the Federal Power Commission (FPC). *See Public Service Co. v. Public Utilities Commission, Colo.*, 644 P.2d 933 (1982) (footnote 1). It is also subject to the jurisdiction of the Colorado Public Utilities Commission and the Kansas Corporation Commission.

GW operates thirteen factories which process sugar beets into sugar. For its factories at Ovid and Sterling, Colorado, and Scottsbluff, Nebraska, GW purchases natural gas directly from KN. For its factory in Goodland, Kansas, GW purchases gas from Northern which is supplied by KN pursuant to a service agreement. Natural gas is used by GW during its "campaigns" for space heating, beet pulp dryers, and boilers. The campaigns (the beet processing period from approximately November to January) coincide with KN's periods of peak demand for natural gas. Except for its space heating requirements which are furnished on a firm basis, GW purchases natural gas on an interruptible basis. For such interruptible service, GW pays a lower rate and maintains an alternate fuel capacity for periods when its gas service is interrupted to meet the demands of domestic and commercial users and other users having a higher priority of service. For interruptions which GW experienced between November 1, 1973, and March 1, 1979, it sought approximately $3.7 million. This represented the difference in price between natural gas under the contracts and the price of fuel oil which had to be used as a substitute fuel during periods of interruption.

GW's and KN's contracts for natural gas service date back to 1955 and were renewed periodically. The provision of the contracts dealing with interruption for the period in question is as follows:

> "It is specifically agreed as a condition precedent to provision of the rate herein and to the making of this agreement by KN that notwithstanding any other pro-

> vision of this agreement delivery of gas to [GW] shall be subject to interruption and that KN, irrespective of the happening of any of the occurrences herein before mentioned or referred to, but in its absolute discretion and without liability to [GW] for damages or otherwise, shall have the right to and at any time with or without notice may interrupt in whole or in part delivery of gas to [GW] hereunder as and whenever from time to time KN is required to do so in order to meet the demands of domestic and commercial users or other users having a higher priority of service.
>
> [GW] further represents and agrees that it will maintain standby fuel installations wherever necessary to avoid irreparable or serious loss or damage to person or property in event of interruption of gas supply."

Similarly, the service agreement between Northern and KN provided for interruptible service.

From 1955 until November 7, 1973, KN determined whether to interrupt GW by comparing its anticipated demand over the next 24 to 36 hours with its available supply of gas. If that projection indicated that there was sufficient natural gas available to meet the anticipated needs of KN's firm and interruptible customers, it would deliver gas to all customers. Otherwise, KN would begin stopping delivery to its interruptible customers. This is referred to as the "historical 24 to 36 hour analysis."

On November 7, 1973, KN stopped using the historical 24 to 36 hour analysis and adopted a new policy concerning the delivery of gas to interruptible customers. Under that policy, KN automatically discontinued deliveries of gas to all interruptible customers whenever it was withdrawing gas from its storage reservoirs. The new policy is referred to as the "storage withdrawal interruption policy."

GW contends that under the contracts KN was entitled to interrupt gas service to the sugar factories only when it lacked either the supply of gas or pipeline capacity to deliver gas to the factories, after first meeting the short term needs of residential and commercial customers, and that KN could only consider the availability of gas supply and pipeline capacity to serve those higher priority needs based on the historical 24 to 36 hour analysis. KN contends that the contracts did not limit its interruption decisions to the short term needs of residential and commercial users, and that orders of the FPC required it to husband gas in storage, if necessary, to meet future high priority demands.

Beginning in the late 1960's there was a national gas shortage. KN's gas reserves were being consumed at a rate faster than they were being replaced by new discoveries. In addition to declining gas reserves, gas pressure declined throughout KN's system because of the depletion of old wells and the reduction in pressure rate of flow, or deliverability. KN had begun utilizing underground storage reservoirs in 1964 to store gas at points on the system nearer the markets, where it could be utilized to maintain pressures in the pipeline. It became increasingly necessary to supplement deliverability from producing fields with deliverability from storage to maintain necessary pipeline pressure.

In response to the national gas shortage, the FPC promulgated various orders and statements of policy. Order No. 431, issued April 15, 1971, (18 C.F.R. § 2.70 (1981)) was a statement of general policy concerning supplies and capacity for the 1971-72 heating season. It encouraged pipeline companies subject to the FPC's jurisdiction to fill their storage fields to meet anticipated demands. It also required the pipelines to submit written reports to the FPC stating how they would implement the FPC policy of protecting dwindling gas supplies and

ensuring service for 1971-72. Any pipeline with a shortage was required to file new tariff sheets setting forth curtailment plans to effectuate the FPC policy. *See Atlanta Gas Light Co. v. FPC,* 476 F.2d 142 (5th Cir.1973).

Order No. 467-B, issued March 1, 1973, (18 C.F.R. § 2.78 (1981)) was another statement of general policy which prescribed "priority-of-service categories for use during periods of curtailed deliveries. . . ." Interruptible industrial requirements, such as GW's, were placed in the lowest categories. In that order, the Commission noted that it was acting because:

> "In situations where the need to curtail arises suddenly and without anticipation, and where no curtailment plan has been approved . . . the pipeline is placed in the difficult position of undertaking service cutbacks at the risk of civil liability to direct and indirect customers if the curtailments are not required by Commission order. . . . *See International Paper Co. v. FPC,* [476 F.2d 121 (5th Cir.1973)]."

Order No. 498, issued December 21, 1973, requested, *inter alia,* "all natural gas pipeline companies, where possible, [to] husband present supplies of natural gas for high priority usage" and required the filing of reports with the FPC on conservation measures that had been undertaken.

On August 29, 1975, KN filed tariff sheets with the FPC which contained the following limitation on service to industrial customers.

> "Seller shall not be required to remove gas from gas storage reservoirs for delivery to consumers served by Seller on an interruptible basis or under interruptible service rate schedules in this Tariff."

The tariff also limited the total volume required to be delivered to users in any calendar year.

A copy of these tariff provisions was mailed to GW on August 29, 1975.

These tariff provisions were suspended by the FPC for a statutory period of five months and were then permitted to become effective as of March 14, 1976, subject to refund pending final Commission approval. In December 1976, additional tariff sheets were filed establishing priorities of service, but retaining the aforementioned limitations. The lawfulness of these tariff provisions was the subject of a proceeding before the FERC designated as Docket No. RP76-90.

On June 25, 1976, GW filed its protest and intervened in RP76-90, claiming that the reductions in its gas service were unlawful because the tariff provisions constituted an abandonment under the Natural Gas Act 15 U.S.C. 717, et seq., (1976). GW specifically complained to the FPC about KN's practice of not serving it when withdrawing gas from storage. The FPC issued an order on June 30, 1977, holding that the tariff provisions should be considered a curtailment plan under Section 4 of the Natural Gas Act, and not an abandonment under Section 7. Under Section 4, the tariff provisions are permitted to become effective, subject to a later determination of their lawfulness.

While this appeal was pending, proceedings in RP76-90 were terminated pursuant to a stipulated settlement. In accepting the settlement, the FERC did not rule on the justness or reasonableness of the tariff sheets filed by KN, and accepted the tariffs as a suitable curtailment plan.

GW sued KN and Northern in January 1978 for breach of contract and fraud. Defendants asserted that the FERC

had primary jurisdiction to hear GW's claims and moved to refer the matters in dispute to the FERC for preliminary agency review. This motion was denied, as were subsequent motions to reconsider the issue.

GW moved for partial summary judgment against KN, asserting that KN's unilateral change in its delivery policy, which took effect on November 7, 1973, constituted a breach of KN's contracts with GW which provided service to GW's Ovid, Sterling, and Scottsbluff factories. KN also moved for summary judgment, asserting that certain FPC tariffs, certificates of public convenience and necessity, and orders immunized KN from contract liability. The trial court granted GW's motion, denied KN's motion, and ruled, as a matter of law, that the plain language of the applicable contracts did not allow KN to unilaterally withdraw any source of supply from GW's use. The trial court also determined, as a separate basis for declaring KN in breach of contract, that KN was obligated to employ the same method it had used for 18 years before November 1973 in determining when to interrupt.

GW filed a second motion for partial summary judgment, contending that it was a third-party beneficiary of the service agreement under which KN supplied gas to Northern for ultimate distribution to, among others, GW's Goodland, Kansas, factory and that KN's November 7, 1973 policy change constituted a breach of the service agreement. The trial court ruled that KN breached the service agreement by interrupting service pursuant to the November 7, 1973 policy change. The court also ruled that GW could, as a matter of law, be a third-party beneficiary of that agreement, subject to an ultimate jury determination of whether KN and Northern intended to confer benefits upon GW under the agreement.

During trial, the court directed a verdict for Northern on the fraud claim and submitted all remaining issues to

the jury. On July 12, 1979, on the breach of contract claim against KN, the jury awarded GW $775,000 for damages sustained at GW's Ovid, Sterling, and Scottsbluff factories. The jury specifically found that KN and Northern intended to confer benefits upon GW under the service agreement and on that contract claim against KN awarded GW $225,000 for damages sustained at the Goodland factory. The jury found for KN on the fraud claim and for Northern on the contract claim. The trial court then awarded prejudgment interest and costs to GW. KN's and GW's post-trial motions were denied and these appeals ensued.

KN argues on appeal that the trial court erred because of: (1) its failure to refer the matter to the FERC under the doctrine of primary jurisdiction, (2) its granting of partial summary judgment on the contract liability issue, (3) its exclusion of certain evidence, (4) its awarding prejudgment interest, and (5) its awarding expert witness fees to GW. GW claims that the court erred in denying its motion for a directed verdict.

I. PRIMARY JURISDICTION

We disagree with KN's contention that the trial court erred in declining to refer issues to the FERC under the doctrine of primary jurisdiction. KN has previously sought and been refused referral by the Colorado Supreme Court, U.S. District Court of Nebraska, and this court.

The doctrine of primary jurisdiction:

> "is a discretionary tool of the courts, a flexible concept to integrate the regulatory functions of agencies into the judicial decision making process by having agencies pass in the first instance on technical questions of fact uniquely within the agency's expertise and experience, or in cases whose referral is necessary to secure uniformity and consistency in the regu-

> lation of business, such as issues requiring the exercise of administrative discretion." *Columbia Gas Transmission Corp. v. Allied Chemical Corp.*, 652 F.2d 503 (5th Cir.1981).

See Nader v. Allegheny Airlines, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976); *Far East Conference v. U.S.*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952); *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir.1976). No fixed formula exists for deciding when to invoke the doctrine, *U.S. v. Western Pacific R.R. Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956), but courts should utilize it reluctantly where the application of the doctrine is inappropriate because of the nature of the action. *Mississippi Power & Light, supra.* Referral of issues to an agency is not required when the issue is strictly a legal one and the issues involved are within the conventional competence of the courts. *Nader, supra.*

The issues presented here involve common law contract claims. The fact that the Natural Gas Act and applicable tariffs affect some of the dealings between the parties does not oust state courts of jurisdiction over these common law claims. *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961); *Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561 (8th Cir.1962). State courts are competent to interpret tariffs as a question of law, *W.P. Brown & Sons Lumber Co. v. Louisville & Nashville R.R. Co.*, 299 U.S. 393, 57 S.Ct. 265, 81 L.Ed. 301 (1937), and the right to ultimate review by the U.S. Supreme Court facilitates uniformity of construction of tariffs. *Pan American v. Superior Court, supra.* Thus, preliminary resort to the FERC is not required merely because the applicability of a tariff is in dispute.

Although referral to an agency is particularly appropriate when the issues are subjects of pending proceed-

ings, *Mississippi Power & Light, supra,* this is no longer the case here, since proceedings in RP76-90 have been terminated.

Our balancing of the benefits of seeking prior agency assistance and the need to resolve this dispute fairly, but expeditiously, *Columbia Gas Transmission, supra,* leads us to the conclusion that the trial court did not err in refusing to refer issues to the FERC. Common law contract claims are the basis of this litigation, and these claims are within the conventional competence of state courts.

II. SUMMARY JUDGMENT

The trial court determined the principal liability issues by summary judgment. It ruled that KN breached its contracts with GW by improperly interrupting gas service to the Ovid, Sterling, and Scottsbluff factories, leaving only the issue of damages for the jury. The court also ruled that KN breached its contract with Northern and that GW could be a third-party beneficiary with regard to gas service to its Goodland factory, subject only to a factual determination by the jury as to whether the parties intended to benefit GW.

A. Breach of Contracts Between GW and KN

The trial court relied upon two grounds in ruling that KN breached its contracts with GW. The first ground was based upon the undisputed fact that GW, as an interruptible customer, did not receive any gas from KN storage facilities under the storage withdrawal interruption policy. We find this ruling consistent with *Kansas-Nebraska Natural Gas Co. v. Consumers Public Power District*, 179 Neb. 687, 140 N.W.2d 10 (1966) which held that, absent contract provisions to the contrary, all sources of supply must be made available to all customers of a gas supplier. We agree with this ruling.

The second ground for the granting of summary judgment was that the parties' course of dealing and course of performance included the historical 24 to 36 hour analysis for interruptions, and that the implementation of the storage withdrawal interruption policy breached the terms of the contract as established by the parties' course of conduct.

KN first argues that the trial court erred in examining the parties' historical behavior because the contracts at issue were not ambiguous and extrinsic evidence should not have been admitted. We disagree.

Evidence of course of dealing and course of performance is admissible if it does not directly contradict the terms of a written agreement, but merely explains or supplements it. *Budget Systems, Inc. v. Seifert Pontiac, Inc.*, 40 Colo.App. 406, 579 P.2d 87 (1978). It is the policy of the Uniform Commercial Code to consider previous course of dealing in determining the meaning of contract provisions. *Amerine National Corp. v. Denver Feed Co.*, 493 F.2d 1275 (10th Cir.1974); §§ 4-1-201(3), 4-1-205, 4-2-208, C.R.S.1973. And, "a course of performance is always relevant to determine the meaning of the agreement" because "[t]he parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was." Section 4-2-208, C.R.S.1973 (official comments 1 and 2).

The evidence relating to the parties' historical conduct under the contract explained how they interpreted the interruptible service provisions of their contracts. This evidence did not contradict any of the express terms of the contracts and was admissible in determining whether the contracts were breached. *Budget Systems, Inc., supra.*

KN argues that if course of dealing is to be considered, then the court should only have considered the parties'

course of performance after November 7, 1973—the date on which the storage withdrawal interruption policy was implemented. We disagree. The long history of the parties' conduct under the contracts is relevant, and the court properly considered it. *See Amerine National Corp., supra.* The parties had been dealing with each other since 1955. Although several contract revisions had been made over the years, these changes did not alter KN's use of the historical 24 to 36 hour analysis, which the trial court properly determined to be the contract standard.

KN next contends that the trial court erred in construing the contracts without giving effect to FPC Orders Nos. 431, 467-B, and 498. We agree that these orders were incorporated by reference into the contract, but find that their exclusion was not prejudicial to KN because none of the orders authorized KN's change in policy.

The interpretation of a written document is a question of law, and this court is not bound by the trial court's interpretation. *Budget Systems Inc., supra.* The following provision was contained in the contracts at issue:

> "This agreement . . . [is] subject to all valid and applicable laws and orders, rules and regulations of duly constituted authorities having jurisdiction or control over the parties, KN's facilities and gas supply, or any transaction contemplated hereby."

KN is a jurisdictional pipeline, subject to the orders of the FPC. *Mississippi Power and Light, supra.* Thus, we hold that the orders were incorporated in the contracts.

We have examined the orders, as summarized above, and do not find that they required a unilateral change in policy on the part of KN. The orders contain statements of general policy, requests to pipelines, and requirements for filing of plans and reports to the Commission. They do not excuse KN's breach of contract.

B. Breach of Service Agreement Between KN and Northern and GW's Third-Party Status

In 1966, GW constructed a new factory near Goodland, Kansas, and negotiated with KN for the purchase of gas for that factory. KN was not authorized to deliver gas in that area, but it told GW that it could do so indirectly through a service agreement with Northern. GW then entered into a contract with Northern for interruptible gas service, but it was KN which determined when service to interruptible customers should be shut off. GW's Goodland factory was treated in the same manner by KN as were the other three factories which were supplied gas directly by KN.

The trial court determined that GW was a direct, not an incidental beneficiary of the service agreement, and that KN's obligation was to deliver gas to Northern, except when it lacked an adequate gas supply to do so. It also ruled that KN could not unilaterally withdraw sources of supply from interruptible customers such as GW. However, the court ruled that a factual question remained as to whether KN and Northern intended to confer benefits upon a class of customers which included GW or GW itself. The jury found that KN and Northern had intended to confer benefits on GW.

KN argues that the trial court erred in granting summary judgment because the contract expressly states that KN was not required to furnish any volumes of gas in excess of firm demand. KN relies on that portion of the service agreement which states:

> "in no case is Seller to be required to furnish on any day a volume larger than the then existing Billing Demand plus (during the winter service period) the Winter Period Demand [total firm demand].

This provision, read alone, appears to grant KN total discretion in supplying gas for interruptible customers. However, another provision in the agreement states:

> "Seller also agrees to make deliveries of gas to Buyer in daily volumes in excess of [firm demand] on an interruptible basis when gas and facilities are available for making such deliveries."

Based on this second provision, the trial court correctly construed the service agreement, in light of the parties' course of performance, to mean that KN could not cut off gas supplies for interruptible customers, unless it lacked an adequate gas supply.

KN next contends that the court erred in determining GW could be a third-party beneficiary under the service agreement. It argues that, under the laws of Kansas, which it contends should be applied, GW could not have been a third-party beneficiary. We disagree.

We do not reach the conflicts of law issue, because under the laws of both Kansas and Colorado, the trial court properly determined that GW could be a third-party beneficiary of the service agreement.

In Colorado, "a person not a party to an express contract may bring an action on such contract if the patries to the agreement intended to benefit such person, provided that the benefit claimed is a direct and not merely an incidental benefit of the contract." *Fourth & Main Co. v. Joslin Dry Goods Co.*, Colo.App., 648 P.2d 178 (1982). The same proposition is true under Kansas law. *Martin v. Edwards*, 219 Kan. 466, 548 P.2d 779 (1976).

Kansas and Colorado law differ on how intent to benefit may be shown. In Kansas, the intent to benefit must be "clearly expressed in the contract" unless the contract is found to be ambiguous. Only if the contract is ambiguous can facts and circumstances surrounding its execution be

used as aids in clarifying the parties' intent. *Martin, supra.* However, "the name of the person to be benefited by the contract need not be given, if he is sufficiently described or designated. Indeed, he may be one of a class of persons, if the class is sufficiently described or designated." *Burton v. Larkin,* 36 Kan. 246, 13 P. 398 (1887), cited with approval in, *Martin, supra.*

Colorado law states that although "intent to benefit the non-party need not be expressly recited by the contract, the intent must be apparent from terms of the agreement as well as surrounding circumstances." *Fourth & Main, supra.*

The service agreement states:

> "WHEREAS, Seller is the owner of a system of pipelines and is engaged in the production, purchase, transportation and sale of natural gas; and
>
> "WHEREAS, Buyer owns and operates distribution and sale of natural gas in the Cities of Goodland and Kanorado, Kansas and for such operations desires a dependable supply of natural gas."

From the express terms of the service agreement, it is obvious that the parties entered into the agreement to benefit Northern's customers in Goodland, Kansas, by providing a dependable supply of natural gas. GW, as a customer in Goodland, was one of the class of persons who were intended beneficiaries of the service agreement. *Burton, supra; Fourth & Main, supra.*

The last error which KN assigns on the issue of the grant of summary judgment is that an issue of material fact existed as to whether KN notified GW of its policy to husband storage gas for high priority users. GW admits that there was an issue of fact as to notification, but contends that while the issue was relevant to their claim of fraudulent non-disclosure, it was immaterial to the breach of con-

tract claim. We agree with GW. KN was required to provide gas to GW from all of its sources of supply, *Kansas-Nebraska v. Consumers, supra,* and its notification to GW that it no longer intended to do so could not alter its contractual obligations. Thus, the trial court correctly concluded that there were no issues of material fact concerning KN's contract liability and properly entered summary judgment.

III. EXCLUSION OF EVIDENCE AT TRIAL

A. KN's Tariffs

KN contends that the trial court erroneously excluded from evidence as irrelevant, their tariffs filed with the FPC. The tariff provisions at issue provided that (1):

> "Seller shall not be required to remove gas from gas storage reservoirs for delivery to consumers served by Seller on an interruptible basis . . . ;"

2) customers receiving gas were subject to volume limitations not to exceed the volumes used in 1975 plus 50,000 MCF (thousand cubic feet); and 3) interruptible customers would be curtailed on the basis of priority categories. KN argues that these tariff provisions were incorporated by reference into the contracts pursuant to the previously quoted contract provision concerning incorporation of orders and regulations. Tariff provisions 1 and 2 outlined above were effective March 14, 1976, subject to possible refunds in the event the tariff was found unlawful by the FERC. 15 U.S.C. 717c(e) (1976). Provision 3 was effective July 1, 1977.

KN argues that the court's exclusion of the tariff resulted in its determination, as a matter of law, that KN breached its contracts when gas was being withdrawn from storage, when the tariffs, as part of the contract rights specifically permitted KN to interrupt for that purpose.

Our interpretation of the tariffs is that the provision at issue permitted KN discretion to enter into contracts limiting the sources of supply. However, the contracts, based upon the parties' prior actions, did not permit such a refusal to supply gas from storage or interruption of service unless KN lacked a sufficient supply of gas.

KN also contends that the exclusion of the tariff was error because it was precluded from introducing evidence of the maximum volume of gas to which GW was entitled under the contract. We disagree. This tariff provision was filed unilaterally by KN and, accordingly, cannot relieve it of contract liability. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956).

KN asserts that the exclusion of the tariff prevented it from showing that under the 1977 tariff provision, GW's dryers were supplied with gas withdrawn from storage after July 1977. Again, we disagree. The tariff would demonstrate why GW claimed less damages for the period but would not insulate KN from liability from all interruptions to the dryers after July 1977. KN's burden was to demonstrate that it did not have an adequate supply of gas on days when interruptions occurred. Its burden was not to show that it properly served the dryers during certain periods. *See* discussion of cross-appeal, *infra*. Thus, the trial court properly ruled that the tariff was irrelevant on the issue of damages.

B. KN's Expert Witness

The trial court excluded much of the testimony of KN's expert for various reasons. Some of the analyses were stricken because the court ruled that KN had breached its discovery obligations by not fully answering interrogatories propounded by GW concerning the expert witness

and had failed to timely provide GW with the expert's work papers. Other analyses were stricken because they were based on facts contrary to the evidence, and because the analyses were not based on the established contract standard which required use of the historical 24 to 36 hour forecast for determining interruptions.

Unless clearly erroneous, a trial court's ruling on the admissibility of expert testimony is conclusive. *Freeman v. Gentry Builders, Ltd.*, 185 Colo. 123, 522 P.2d 739 (1974). The trial court has broad discretion to determine the sanctions to be imposed on a party for failure to disclose the substance of testimony intended to be elicited from a witness. C.R.C.P. 16(d)(3). *Wood v. Rowland*, 41 Colo.App. 498, 592 P.2d 1332 (1978). *See* C.R.C.P. 26(b)(4)(A)(i). This is especially true in view of the continuing duty to disclose and supplement in a reasonable manner the substance of an expert witness' testimony. C.R.C.P. 26(e)(1). *See Dolan v. Mitchell*, 179 Colo. 359, 502 P.2d 72 (1972). Furthermore, expert testimony may not be based on facts which are contrary to the evidence. *Liber v. Flor*, 160 Colo. 7, 415 P.2d 332 (1966).

With these principles in mind, we have reviewed the trial court's evidentiary rulings and do not find that the court abused its discretion, or that the rulings are clearly erroneous. Therefore, we find no error in the exclusion of parts of the expert's testimony.

Also, KN's reliance on *Crist v. Goody*, 31 Colo.App. 496, 507 P.2d 478 (1972) is misplaced. There, this court held that a trial court has discretion to exclude evidence which was not properly identified before trial, but if the evidence is admitted, then the granting of a motion for mistrial or continuance is obligatory. Here, the trial court properly excluded the evidence.

IV. PREJUDGMENT INTEREST

In view of our ruling on the cross-appeal in VI, *infra*, reversing the judgments insofar as they pertain to the money damages awarded and remanding the case for a new trial on the issue of damages, the award of prejudgment interest is also vacated. However, since the questions raised will come up again following the new trial, we will address them now.

The court found that KN had wrongfully withheld property, and therefore, GW was entitled to interest under § 5-12-102(1)(a), C.R.S.1973 (1981 Cum.Supp.). It further found:

> "That the gain or benefit to the Defendant, Kansas-Nebraska, by virtue of such withholding of property from the Plaintiff was at least the interest rate to pay for borrowed money during the period of time in question which was ten percent.
>
> "That the damage award of the jury must be prorated over the period that Plaintiff claims arose, being approximately six years, with interest compounded annually to the date of the judgment."

Accordingly, the court found that GW incurred damages of $166,666 in each of the first two years of damages and $166,667 in each of the four succeeding years, and awarded prejudgment interest in the amount of $350,229.

Contrary to KN's contention, we agree with the trial court's conclusion that § 5-12-102(1)(a), C.R.S.1973 (1981 Cum.Supp.) which became effective July 1, 1979, applies to any judgments in this case entered after that date. *Jasken v. Sheehy Construction Co.*, Colo.App., 642 P.2d 58 (1982). *Jasken* is dispositive of KN's contention that the amended statute is inapplicable because the withholding of the property was prior to the effective date of the amendment.

Pursuant to § 5-12-102(1), GW was entitled, at its election, to prejudgment interest at the rate of 8 percent per annum compounded quarterly, or "an amount which fully recognizes the gain or benefit realized" by KN.

The trial court awarded prejudgment interest at the rate of 10 percent. Its findings are inadequate for us to determine the basis upon which it determined the "gain or benefit realized" by KN in withholding the gas. Without these findings the award of interest at the rate of 10 percent was in error.

Furthermore, there was no factual basis for the courts proration of the jury award equally over the six year period in question. The statute provides that interest should run from the "date of wrongful withholding." The trial court's award made no findings in this regard and was therefore in error. On remand, the trial court should make the determinations outlined above prior to awarding prejudgment interest.

V. EXPERT WITNESS FEES

The last error that KN assigns is the trial court's award of $44,382.21 to GW's expert who did not testify at trial because of the exclusion of KN's expert's testimony. There is no error in the trial court's decision that GW was entitled to an award of costs for its expert, even though he did not testify. *Leadville Water Co. v. Parkville Water District,* 164 Colo. 362, 436 P.2d 659 (1967); § 13-33-103(4), C.R.S. 1973; 10 *C. Wright & A. Miller, Federal Practice & Procedure* § 2678 at 230 (1973).

However, the trial court's order made no findings as to the reasonableness of the fee that GW's expert charged. Thus, we are unable to determine whether the court abused its discretion in the determination of the amount awarded to GW. On remand, the court should, after a hearing if

necessary, make factual findings as to the reasonableness of the fee, and modify the award if appropriate.

VI. CROSS-APPEAL

As a method of proving its total damages, GW introduced evidence consisting of calculations which showed its increased costs for each of the approximately 250 days in which interruptions occurred. In its defense, KN presented what it admits was only "evidence of a general nature and not on a day-by-day basis." This pertained to its declining reserves and deliverability during the approximately six year period, its problems in trying to serve its firm and interruptible customers on peak days during the winter, and the severity of the 1978-79 winter.

At the conclusion of KN's case and again after all the parties had rested, GW moved the court to instruct the jury, in the nature of a directed verdict, that it was to award to GW damages on the contract claims for each and every day of interruption of service after KN put its storage withdrawal interruption policy into effect. The motion was grounded on KN's failure to present any evidence demonstrating its physical inability to deliver gas to GW on any of the days when interruptions occurred. The court denied the motion.

GW also tendered a jury instruction to the same effect, which the court refused. Instead, the court instructed the jury that KN had the evidentiary burden of showing "that its nonperformance was excused on any given day due to its physical inability to deliver gas to Great Western." The verdict forms submitted to the jury, without objection, provided a space only for the award of a total amount of damages, without itemization on a day by day or year by year basis. Following the jury verdict, for the reasons advanced in its motion for directed verdict, GW sought and was denied a judgment notwithstanding the verdict.

On cross-appeal, GW contends that the trial court erred in denying its motion for a directed verdict instructing the jury to award damages for each day that KN breached its contract and interrupted GW's gas service, without any reference to excuse for nonperformance. We agree.

A party who seeks to invoke an affirmative defense of excuse has the burden of proving its applicability. *Machebeuf v. Clements,* 2 Colo. 36 (1873), *aff'd,* 92 U.S. 418, 23 L.Ed. 504 (1876); *New Britain Machine Co. v. Yeo,* 358 F.2d 397 (6th Cir. 1966), *Detroit Edison Co. v. Main Island Creek Coal Co.,* 295 F. 781 (4th Cir.1924). *See Comfort Homes, Inc. v. Peterson,* 37 Colo.App. 516, 549 P.2d 1087 (1976).

Here, KN had knowledge uniquely within its possession as to the conditions which existed in its system for each day in which an interruption occurred. With this unique knowledge, as testified to by KN's chief dispatcher of gas, KN could have determined with precision which, if any, interruptions would have occurred, even under the historical 24 to 36 hour analysis. But, as found by the trial court and admitted by KN, KN failed to present any evidence to demonstrate that its nonperformance was excused on any given day.

The issue of the amount of damage incurred by GW resulting from each day's interruption remained a jury question. But on the evidence presented, even viewed in the light most favorable to KN, *Safeway Stores v. Langdon,* 187 Colo. 425, 532 P.2d 337 (1975), GW was entitled to the directed verdict it sought.

Lastly, in view of our ruling on the cross-appeal, we do not address GW's contention that the jury only awarded damages for the 1973-1974, 1974-1975, and 1975-1976 campaigns.

Accordingly, the damages portion of the judgment in favor of GW and against KN is reversed, and the cause is

remanded for a new trial on the issue of GW's damages incurred on each day that KN interrupted service to GW during the subject period. The award of prejudgment interest is vacated; the expert's fee is to be reviewed as directed in V *supra;* all other orders and the balance of the judgments are affirmed.

COYTE and VAN CISE, JJ., concur.

APPENDIX C

PROVISIONS OF NATURAL GAS ACT

(15 U.S.C. §§ 717 *et seq.*)

SEC. 4(b)

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. (15 U.S.C. § 717c(b))

SEC. 7(c)*

No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such

* This is the text of Section 7(c) as it existed prior to amendments made by Section 608 of the Natural Gas Policy Act of 1978.

certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. (15 U.S.C. § 717f(c))

APPENDIX D

REGULATIONS OF THE FEDERAL POWER COMMISSION AND FEDERAL ENERGY REGULATORY COMMISSION

Statements of General Policy and Interpretations of the Commission

18 C.F.R. § 2.70 *Measures for the protection of reliable and adequate natural gas service.*

(a) This Commission, charged with the responsibility for natural gas reliability, hereby promulgates as a statement of general policy that jurisdictional pipeline companies shall take all steps necessary for the protection of as reliable and adequate service as present supplies and capacities will permit during the 1971-72 heating season and thereafter, including adequate injection into storage in anticipation of the heating season.

(b) In order to effectuate the foregoing:

(1) During the storage injection season all natural gas pipelines subject to the jurisdiction of the Commission should make every reasonable effort to fill all storage fields supplied by such pipelines to a capacity sufficient to meet the anticipated heating season demands.

(2)(i) All jurisdictional pipelines will within 30 days hereof, submit a written report (four copies) to the Secretary of the Commission indicating how the instant statement of policy will be implemented. Pipelines responding that curtailment will be necessary will file a tariff sheet, pursuant to sections 4 and 5 of the Natural Gas Act and the Commission's regulations thereunder, setting forth a curtailment plan to effectuate the instant policy or state that the curtailment program, if any, currently on file will effectuate this policy. The curtailment plan proposed may be divided between the injection season and the heating

season, since different objectives may require different treatment.

(ii) Consideration should be given to the curtailment of volumes equivalent to all interruptible sales and to the curtailment of large boiler fuel sales where alternate fuels are available.

(3) The Commission, recognizing that additional short-term purchases of natural gas may be necessary to meet a pipeline's system demands for the immediate future, will continue the sixty (60) day emergency sales commenced under § 157.29 (18 CFR 157.29) pursuant to the certification provisions of this subsection. If a pipeline demonstrates continued emergency need, after complying with paragraphs (b)(1) and (2) of this section, the Commission will consider authorizing the pipeline to make gas purchases for a limited term at a rate above the national rate level prescribed in § 2.56(h) (18 CFR 2.56(h)) and will authorize abandonment of the sale at the time the certificate is issued if the same is demonstrated to be in the public interest: *Provided, however,* The certification authority set forth in this section shall apply to sales of natural gas from the offshore Federal domain only where the sales are made at the rate prescribed in § 2.56(h).

(4) Where emergency gas purchases are made and/or a curtailment program is instituted to implement the above policy the pipeline should place, or already have in effect, volumetric limitations on sales at current levels.

(5) Notice should be taken that the Commission will re-examine existing commodity rate levels and, to the extent necessary, may redesign existing commodity-demand rate relationships in present and future pipeline rate cases.

(6) Pipelines who can do so are encouraged to propose exchange arrangements with other pipelines.

(7) Jurisdictional pipelines have the responsibility in the first instance to adopt a curtailment program by filing appropriate tariffs. Such tariffs, if approved by the Commission, will control in all respects notwithstanding inconsistent provisions in sales contracts, jurisdictional and non-jurisdictional, entered into prior to the date of the approval of the tariff.

(c) Nothing stated herein should be construed as placing a limitation on measures to be taken by jurisdictional pipelines to effectuate the instant policy.

(Secs. 4, 5, 7, 8, 10, 16; 52 Stat. 83, 85; 15 U.S.C. 717c, 717d, 717f, 717g, 717i, 717*o*)
[Order 431, 36 FR 7505, Apr. 21, 1971, as amended by Opinion 699-B, 39 FR 33206, Sept. 16, 1974]

PART 154—RATE SCHEDULES AND TARIFFS

18 C.F.R. § 154.21 *Effective tariff.*

The effective tariff of a natural-gas company shall be the tariff filed pursuant to the requirements of this part, and permitted by the Commission to become effective. No natural-gas company shall directly or indirectly, demand, charge or collect any rate or charge for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or impose any classifications, practices, rules or regulations, different from those prescribed in its effective tariff and executed service agreements on file with the Commission, unless otherwise specifically provided by order of the Commission.

PART 157—APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

18 C.F.R. § 157.20(e)

The certificate issued to applicant is not transferable in any manner and shall be effective only so long as applicant continues the operations authorized by the order issuing such certificate and in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations, and orders of the Commission.

APPENDIX E

Motion to Dismiss of Kansas-Nebraska Natural Gas Co , Inc.
(filed May 2, 1978; denied August 11, 1978)

COUNTY OF LOGAN
STATE OF COLORADO

Civil Action No. 13503

THE GREAT WESTERN SUGAR COMPANY, a Delaware corporation, *Plaintiff*,

vs.

NORTHERN NATURAL GAS CO., A Delaware corporation, and KANSAS-NEBRASKA NATURAL GAS CO., INC., a Kansas corporation, *Defendants*.

MOTION TO DISMISS

Pursuant to Rule 12 of the Colorado Rules of Civil Procedure, Defendant, Kansas-Nebraska Natural Gas Co., Inc., moves the Court for an order dismissing Plaintiff's action because (a) such action constitutes an impermissible collateral attack on policies, orders, rules and regulations of the Federal Energy Regulatory Commission, (b), Plaintiff has not yet exhausted its administrative remedies, and (c) therefore, this Court lacks jurisdiction of the subject matter of this action.

A memorandum in support of this motion is being filed herewith and Defendant, Kansas-Nebraska Natural Gas Co., Inc., asks the privilege of presenting oral argument in support of the motion.

Respectfully submitted,

Arnold W. Baxter, Esquire
(Attorney Registration No. 001943)
ARNOLD & ROSS
Suite 201, H & B Building
118 Main Street
Sterling, Colorado 80751
Telephone: (303) 522-2341

Arthur R. Hauver, Esquire
(Attorney Registration No. 549)
JONES, MEIKLEJOHN, KEHL & LYONS
1600 Lincoln Center Building
1660 Lincoln Street
Denver, Colorado 80264
Telephone: (303) 861-4028

APPENDIX F

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF LOGAN
STATE OF COLORADO

Civil Action No. 13503

THE GREAT WESTERN SUGAR COMPANY, a Delaware corporation, *Plaintiff*,

v.

NORTHERN NATURAL GAS CO., a Delaware corporation, and KANSAS-NEBRASKA NATURAL GAS CO., INC., a Kansas corporation, *Defendants*.

ORDER GRANTING THE MOTION FOR PARTIAL SUMMARY JUDGMENT OF PLAINTIFF AGAINST KANSAS-NEBRASKA AS TO LIABILITY AND DENYING KANSAS-NEBRASKA'S MOTION FOR SUMMARY JUDGMENT

Plaintiff The Great Western Sugar Company ("Great Western") has moved for the entry of partial summary judgment against Kansas-Nebraska Natural Gas Co., Inc. ("Kansas-Nebraska") on the grounds that there is no genuine issue of material fact as to an interpretation of the contracts at issue herein, that those contracts may be interpreted as a matter of law and that there is no dispute of material fact as to Kansas-Nebraska's breach thereof. Kansas-Nebraska has also moved for summary judgment, asserting as does Great Western that there are no genuine issues of material fact as to an interpretation of the governing contracts and that it has fully complied with those contracts. On the basis of the pleadings, excerpts of depositions, answers to interrogatories, exhibits, affidavits, and

other materials filed by the parties in support of their motions, the Court finds the following facts are undisputed:

In 1955, the parties entered into a contractual relationship under which Kansas-Nebraska was obligated to sell natural gas to Great Western for its plant at Ovid, Colorado. This contract and subsequent contracts entered into between Great Western and Kansas-Nebraska for the Ovid plant, as well as Great Western's plants at Sterling, Colorado and Scottsbluff, Nebraska, provided that Kansas-Nebraska's duty to perform its obligation to supply natural gas under the contracts would be excused under certain circumstances. The material provision for purposes of the pending motions is the "interruptible" provision of the various contracts. This original contract was drafted by Kansas-Nebraska, as were other contracts entered into thereafter from time to time by Great Western and Kansas-Nebraska.

For over eighteen years (from 1955 to 1973), Kansas-Nebraska operated under the "interruptible" provision by anticipating the system-wide demand for natural gas over a short time frame, described by Kansas-Nebraska's dispatching personnel as 24 to 36 hours. Kansas-Nebraska would then make a determination of whether it was physically able to supply the needs of all customers. If Kansas-Nebraska considered itself unable to meet these needs, it would "interrupt" or shut off service to certain customers to the extent necessary, in the appropriate order of priority. In making this determination throughout the 1955 through 1973 time period, Kansas-Nebraska made no distinction or separation amongst its sources of supply and the facilities which it would make available to its customers.

In approximately 1964, Kansas-Nebraska established its first storage field. From 1964 to 1973 Kansas-Nebraska from time to time furnished natural gas to Great Western at times when it was withdrawing gas from storage and

made no distinction between gas from storage and gas from other sources of supply or facilities in its practice under the interruptible provision. On November 7, 1973, Kansas-Nebraska's management instituted a new practice pursuant to which Kansas-Nebraska would determine when to interrupt service. Under this new practice, which totally changed the basis on which service was to be interrupted, Kansas-Nebraska no longer examined its anticipated system-wide demands over a short time frame, but rather interrupted service to Great Western and others whenever it was withdrawing natural gas from its storage facilities.

Based on these undisputed facts, the Court makes the following conclusions of law:

1. The language of the contract is plain and unambiguous. Under the contract language, Kansas-Nebraska is obligated to deliver gas to Great Western, but nonperformance is excused upon the occurrence of certain circumstances, which are described in the interruptible provision among others. Under the interruptible provision, Kansas-Nebraska may interrupt service whenever it is "required to do so in order to meet the demands of domestic and commercial users or other users having a higher priority of service" than Great Western. This language permits Kansas-Nebraska to anticipate the needs of its customers over a short time frame and to determine whether it can meet those short-term needs.

The contract does not enable Kansas-Nebraska to designate unilaterally which sources of supply and facilities it will make available to interruptible customers. There is no difference for purposes of this contract between a natural gas production field and a storage facility. While Kansas-Nebraska was under no duty to acquire new producing fields or storage facilities, once Kansas-Nebraska acquired those sources and facilities it was obligated to make them available.

2. The language of the contract is consistent with the parties' course of performance. For eighteen years, Kansas-Nebraska anticipated the system-wide demands of its users over a 24 to 36 hour period, and determined whether it was physically able to supply gas to accommodate those demands. Further, from 1964 to 1973 Kansas-Nebraska from time to time furnished natural gas to Great Western at ~~times~~ when it was withdrawing gas from storage and made no distinction between gas from storage and gas from other sources of supply or facilities in its practice under the interruptible provision. The contract language and the parties' course of performance are plainly harmonious.

On the basis of the foregoing undisputed facts and conclusions of law, the Court rules that Kansas-Nebraska breached its contracts with Great Western both by interrupting service to Great Western, without considering whether Kansas-Nebraska could physically supply the needs of its customers from all sources of supply and facilities on a short time frame basis as it had done for the first eighteen years of the parties' contractual relationship, and by interrupting service to Great Western at such times as Kansas-Nebraska was withdrawing natural gas from storage.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Partial Summary Judgment is hereby granted and that judgment of liability is hereby entered in behalf of the Plaintiff and against the Defendant Kansas-Nebraska Natural Gas Company, Inc., a Kansas corporation, upon Plaintiff's First Claim for Relief.

IT IS FURTHER ORDERED that the Motion for Summary Judgment for Defendant Kansas-Nebraska Natural Gas Company, Inc. is hereby denied.

IT IS FURTHER ORDERED that Defendant Kansas-Nebraska Natural Gas Company, Inc. shall have 20 days

from the date of this Order in which to file any post-hearing motions.

DONE IN OPEN COURT this 31st day of January, 1979.

BY THE COURT:

/s/ WAINO JOHNSON
District Judge

TRUE COPIES MAILED:

Mr. Kenneth Starr
Mr. Thomas Stifler
Mr. William Smith

January 31, 1979.

/s/ [Illegible]
Official Reporter

APPENDIX G

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF LOGAN
STATE OF COLORADO

Civil Action No. 13503

THE GREAT WESTERN SUGAR COMPANY, a Delaware corporation, *Plaintiff*,

v.

NORTHERN NATURAL GAS Co., a Delaware corporation, and KANSAS-NEBRASKA NATURAL GAS Co., INC., a Kansas corporation, *Defendants*.

ORDER DENYING PLAINTIFF'S SECOND MOTION FOR ENTRY OF PARTIAL SUMMARY JUDGMENT AGAINST KANSAS-NEBRASKA

Plaintiff The Great Western Sugar Company ("Great Western") has moved for the entry of partial summary judgment against Kansas-Nebraska Natural Gas Co., Inc. ("Kansas-Nebraska") on the ground that there is no genuine issue of material fact as to Great Western's status as an intended third party beneficiary of the Service Agreement between Kansas-Nebraska and Northern Natural Gas Co. ("Northern"), Kansas-Nebraska's obligations under that Agreement and Kansas-Nebraska's breach of those obligations.

Great Western submits that Kansas-Nebraska and Northern entered into a Service Agreement concerning the wholesale supply of gas to the Goodland, Kansas area. The Service Agreement obligates Kansas-Nebraska to deliver natural gas to Northern "when gas facilities are available for making such deliveries." Great Western sub-

mits that this language unambiguously obligates Kansas-Nebraska to deliver natural gas to satisfy the demands of Northern's firm and interruptible customers except when Kansas-Nebraska is physically unable to do so. Great Western submits that Kansas-Nebraska's and Northern's course of performance under the Service Agreement reveals that, for many years prior to November 1973, Kansas-Nebraska delivered sufficient natural gas to satisfy the total demand of Northern's firm and interruptible customers at Goodland except when it was physically unable to do so. During this time Kansas-Nebraska drew upon all sources of supply and facilities in its effort to accommodate its customers' needs. Great Western submits that, at least since April 4, 1967, Kansas-Nebraska has determined when to interrupt service to the Goodland factory, with Northern deferring to Kansas-Nebraska's interruption decisions.

Great Western submits that Kansas-Nebraska's November 7, 1973 policy change, described previously in this Court's January 31, 1979 Order, impaired service to the Goodland, Kansas factory in the same manner that it impaired service to Great Western's Ovid, Sterling and Scottsbluff factories. Great Western submits that all interruptions at the Goodland, Kansas factory which result from this policy change constitute a breach of the Service Agreement.

Great Western submits that it is an intended third party beneficiary of the Service Agreement. Great Western submits that the Service Agreement was made for the benefit of the ultimate consumers in the cities of Goodland and Kanorado, Kansas, a class of customers which includes Great Western. Great Western submits that it is sufficiently designated in the Service Agreement so as to acquire a third party beneficiary status. Great Western submits that the benefit which it receives from Kansas-Nebraska's performance under the Service Agreement is direct and not incidental. Great Western submits that Kansas-Nebraska

and Northern, in entering into the Service Agreement and in negotiating with Great Western for the ultimate sale of gas to its Goodland, Kansas factory, intended to confer benefits upon Great Western or a class of customers which includes Great Western. Great Western submits that Kansas-Nebraska's active involvement during the Goodland negotiations and Northern's deference to Kansas-Nebraska's interruption decisions also lead to the conclusion that Great Western is a third party beneficiary.

The Court has reviewed the parties' briefs, exhibits attached thereto and authorities. In so doing, the Court concludes that Great Western has satisfied every contention outlined above, as a matter of undisputed fact, with one exception: did Northern and Kansas-Nebraska intend to confer benefits upon Great Western or a class of customers which includes Great Western. The parties' intention in this regard poses genuine issues of material fact for the jury.

IT IS THEREFORE ORDERED that Plaintiff's Second Motion for Entry of Partial Summary Judgment is denied, and that the jury will consider the sole issue of the parties' intent in this matter as outlined above.

DONE IN OPEN COURT this —— day of May, 1979.

BY THE COURT:

Waino Johnson
District Court Judge

APPENDIX H

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF LOGAN
STATE OF COLORADO

Civil Action No. 13503

THE GREAT WESTERN SUGAR COMPANY, a Delaware corporation, *Plaintiff*,

v.

NORTHERN NATURAL GAS Co., a Delaware corporation, and KANSAS-NEBRASKA NATURAL GAS Co., INC., a Kansas corporation, *Defendants*.

MOTION TO REFER ISSUES TO THE FEDERAL ENERGY REGULATORY COMMISSION

Defendant, Kansas-Nebraska Natural Gas Co., Inc. (Kansas-Nebraska), moves that the following issues be referred to the Federal Energy Regulatory Commission (FERC):

1. Does the FERC have jurisdiction under the Natural Gas Act over the natural gas service, gas supply and transmission capacity of Kansas-Nebraska?

2. Under FPC Orders Nos. 431, 467B and 498 and Opinion No. 643, was Kansas-Nebraska required to husband gas in storage for its high priority users whether or not such policy was translated into tariff provisions and filed with the FPC?

3. Was Kansas-Nebraska's decision in 1973 that it should not provide service to large interruptible boiler fuel customers during periods of withdrawal of gas from storage

reservoirs in accordance with FPC policies and orders and Kansas-Nebraska's contracts with Great Western?

4. Do the contracts between Kansas-Nebraska and Great Western, as interpreted by Great Western, result in an undue perference or advantage to Great Western under Section 4(b) of the Natural Gas Act?

5. Is Great Western's interpretation of the interruption provisions of the contracts between Kansas-Nebraska and Great Western inconsistent with the terms of the certificates of public convenience and necessity which authorize Kansas-Nebraska to provide service to Great Western?

6. Is Great Western's interpretation of the interruption provisions of the contracts between Kansas-Nebraska and Great Western inconsistent with the terms of the certificates of public convenience and necessity which authorize Kansas-Nebraska to operate its storage fields?

7. Would an award of damages by this court to Great Western constitute an undue preference or advantage in contravention of Section 4(b) of the Natural Gas Act?

8. Would an award of damages by this court to Great Western for interruptions in service beginning in November, 1973 adversely affect the FERC's ability to carry out its responsibilities under Sections 4, 5 and 7 of the Natural Gas Act?

9. Does the court's interpretation of the interruption provisions of the contracts between Kansas-Nebraska and Great Western adversely affect the FERC's ability to carry out its responsibilities under Sections 4, 5 and 7 of the Natural Gas Act?

10. Is Kansas-Nebraska immune from contractual liability for not serving its interruptible industrial customers

from storage by reason of its tariffs and FERC orders, rules and regulations?

A memorandum is submitted in support of this motion.

Oral argument is requested.

LARRY D. HALL
Kansas-Nebraska Natural
Gas Co., Inc.
P. O. Box 608
Hastings, Nebraska 68901

APPENDIX I

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF LOGAN
AND STATE OF COLORADO

Civil Action No. 13503

THE GREAT WESTERN SUGAR COMPANY,
Plaintiff,

vs.

NORTHERN NATURAL GAS CO., and
KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.,
Defendants.

ORDER RE: FEDERAL ENERGY REGULATORY COMMISSION

THIS MATTER coming on for hearing on May 30th, 1979, upon Defendant's, Kansas-Nebraska Natural Gas Co., Inc., motion that certain issues be referred to the Federal Energy Regulatory Commission and the Plaintiff being represented by Shank, Irwin, and Holmes and the Defendant, K-N, being represented by Hershberger, Patterson, Jones, and Roth, and the Federal Energy Regulatory Commission having submitted a brief Amicus Curiae, by Howard E. Shapiro, Solicitor, and Kristina Nygaard, Attorney, and the Court having considered the motion together with the briefs in support and opposition thereto and having taken the matter under advisement now finds that this case involves common law issues which involve relief for the Plaintiff since November 7, 1973, and that through this action the Plaintiff can recover such damages wherein the FERC could not award damages prior to the date on which the tariff request was made involving withdrawal of storage

gas for interruptible contracts and that this Court in its discretion does not feel that the parties should be subjected to the delay which would be created by reference of any particular issues to the Federal Energy Regulatory Commission, and that the motion should be denied.

IT IS THEREFORE ORDERED that Defendant's, Kansas Nebraska Natural Gas Company, motion to refer issues to the Federal Energy Regulatory Commission is hereby denied.

DONE IN OPEN COURT this 8th day of June, 1979.

BY THE COURT:

/s/ WAINO JOHNSON
Waino Johnson

TRUE COPIES MAILED:

Mr. Jeffery Reiman, Esq.
Mr. Thomas Stifler, Esq.
Mr. William Smith, Esq.

/s/ J.L.R. AVEY
Official Reporter

APPENDIX J

IN THE SUPREME COURT
OF THE STATE OF COLORADO

NO. 79SA269

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.,
a Kansas corporation,
Petitioner,

vs.

DISTRICT COURT, Thirteenth Judicial District,
State of Colorado,
Respondent.

PETITION FOR WRIT OF PROHIBITION

Kansas-Nebraska Natural Gas Company, Inc. (hereinafter Kansas-Nebraska) petitions this Court to issue a writ of prohibition to prevent the District Court of the Thirteenth Judicial District from proceeding with trial in a pending action entitled "The Great Western Sugar Company, a Delaware corporation, v. Northern Natural Gas Company, Inc., a Delaware corporation, and Kansas-Nebraska Natural Gas Company, Inc., a Kansas corporation," Civil Action No. 13503, because such trial requires determination of issues over which the District Court lacks jurisdiction.

As grounds for the requested writ, it is submitted that:

1. The Federal Energy Regulatory Commission (hereinafter the FERC or the Commission) rather than respondent has exclusive and primary jurisdiction over the principal issues in the pending case.

2. The actions of respondent violate the supremacy clause of the United States Constitution by interfering with the overriding authority of the United States pursuant to the Natural Gas Act, the rules, regulations, orders and certificates of public convenience and necessity issued by the FERC thereunder, and petitioner's tariffs on file with the Commission.

3. Respondent lacks jurisdiction because The Great Western Sugar Company (hereinafter Great Western) has not exhausted the administrative remedies which it was pursuing before the pending court action was filed, which Great Western continues to pursue, and petitioner faces substantial risk of being subjected to inconsistent orders or judgments and thus will suffer irreparable injury.

4. An award of damages by respondent would constitute an undue preference or advantage to Great Western, in violation of Section 4(b) of the Natural Gas Act [15 U.S.C. § 717(c)], and force petitioner to violate the Natural Gas Act.

STATEMENT OF FACTS

The facts which give rise to this petition are as follows:

1. Petitioner is a natural gas company, engaged in the transportation of natural gas in interstate commerce and subject to regulation by the Federal Energy Regulatory Commission, 15 U.S.C. § 717, *et seq.*

2. Since 1953, petitioner has entered into various contracts with Great Western for delivery of natural gas to Great Western's sugar factories at Ovid and Sterling, Colorado, and Scottsbluff, Nebraska, on an interruptible basis. (Exhibit A is a current example.) In connection with the delivery of gas to each of Great Western's factories, petitioner has been required by the Natural Gas Act to secure, and has secured, the issuance from the Commission

of a certificate of public convenience and necessity permitting the service contemplated under the contracts. Each of the contracts between petitioner and Great Western is required to be filed with the Commission before service is commenced pursuant to the certificate authorizing service. In addition, petitioner has filed with the Commission tariffs stating the conditions of service to Great Western, as well as to petitioner's other customers, both firm and interruptible. Such tariffs have been from time to time accepted and approved by the Commission. To the extent that the certificates of convenience and the tariffs differ in terms and conditions of service from the contracts, the certificates and tariffs control. [*Home Bldg. & L. Assn. v. Blaisdell*, 290 U.S. 398, 78 L.Ed. 413, 54 S.Ct. 231; *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 (1971), cert. den., 404 U.S. 951, 1063 (1972)] Moreover, the contracts provide:

REGULATION

> This agreement and the respective rights and obligations of the parties hereto are subject to all valid and applicable laws and orders, rules and regulations of duly constituted authorities having jurisdiction or control over the parties, KN's facilities and gas supply, or any transaction contemplated hereby.

3. From the beginning of the relationship between petitioner and Great Western, the contracts have contained provisions for interruption of service to Great Western in language similar to the following (which is found in the March 1973 contracts for service to the Ovid and Sterling factories):

INTERRUPTION

> It is specifically agreed as a condition precedent to provision of the rate herein and to the making of this agreement by KN that notwithstanding any other provision of this agreement delivery of gas to Buyer shall

> be subject to interruption and that KN, irrespective of the happening of any of the occurrences hereinbefore mentioned or referred to, but in its absolute discretion and without liability to Buyer for damages or otherwise, shall have the right to and at any time with or without notice may interrupt in whole or in part delivery of gas to Buyer hereunder as and whenever from time to time KN is required to do so in order to meet the demands of domestic and commercial users or other users having a higher priority of service.
>
> Buyer further represents and agrees that it will maintain standby fuel installations wherever necessary to avoid irreparable or serious loss or damage to person or property in event of interruption of gas supply.

Notwithstanding the broad language of the interruption provisions of the contract, prior to November 1973 interruptions of gas service to Great Western's factories generally were for short periods of time only under conditions of mechanical failure or temporary shortage of supply or physical capacity.

4. In the early 1970's shortages of natural gas began to develop nationwide and on April 15, 1971, the Commission issued Order No. 431. Among the directives to interstate pipelines was the following:

> (7) Jurisdictional pipelines have the responsibility in the first instance to adopt a curtailment program by filing appropriate tariffs. Such tariffs, if approved by the Commission, will control in all respects notwithstanding inconsistent provisions in sales contracts, jurisdictional and non-jurisdictional, entered into prior to the date of the approval of the tariff.

On June 8, 1973, the Commission issued Order No. 467, and later No. 467-B, dealing with priorities of deliveries during periods of curtailment. Also during 1973 the Commission issued Opinion No. 643, 49 FPC 53 (1973), which

approved a husbanding plan, similar to that later adopted by petitioner, proposed by the Arkansas-Louisiana Gas Company, aimed at insuring firm winter service.

5. As a result of the aforementioned Commission orders and opinions, petitioner determined it could no longer legally serve large interruptible customers while withdrawing natural gas from or injecting natural gas into storage. Accordingly, from and after November 7, 1973, petitioner has followed the practice of not accommodating its interruptible customers with gas from storage in order to assure service to higher priority users.

Still later in 1973, the Commission issued Order No. 498 which reaffirmed its husbanding directives. These directives were implemented by petitioner by various actions, including discontinuance of service from storage to interruptible customers.

In August 1975, petitioner filed tariffs with the Commission containing, among other provisions, the following practice with respect to service from storage:

> Seller shall not be required to remove gas from storage reservoirs for delivery to consumers served by Seller on an interruptible basis or under interruptible service rate schedules in this Tariff. (FPC Gas Tariff, Third Revised Volume No. 1, Section 13b[4]).

This tariff was filed August 29, 1975, and became effective March 14, 1976. Revised tariff sheets were filed December 27, 1976, which contained essentially the same provision. The lawfulness of this tariff has been challenged by Great Western before the Commission in the curtailment proceeding FERC Docket No. RP76-90.

6. Docket No. RP76-90, entitled "Kansas-Nebraska Natural Gas Company, Inc." was initiated by the Federal Power Commission (predecessor to the FERC) on April 26, 1976. The proceedings are currently pending before a

Presiding Administrative Law Judge, who has filed two initial decisions. Great Western has intervened in the proceedings, has been participating actively therein, and has sought affirmative relief from the Commission.

The subject of these proceedings is petitioner's program for the allocation of natural gas supplies and pipeline capacity among petitioner's customers. Among the issues before the Commission are the following:

(a) The factual basis under which petitioner adopted its program of curtailment, e.g.:

(1) Storage withdrawal practices;

(2) Storage injection practices;

(3) Priority of service categories;

(4) Adequacies of petitioner's gas supply; and

(5) Pipeline capacity.

(b) The lawfulness of petitioner's current effective tariff provisions.

(c) If the tariff is deemed to be unlawful in whole or in part, the relief due affected customers of petitioner in the form of money damages or payback of gas.

Inherent in the foregoing is whether or not petitioner is immune from contractual liability and whether or not FPC Orders numbered 431, 467, 467-B and 498, Opinion No. 643 and petitioner's certificates of public convenience and necessity permit service to interruptible boiler fuel customers, such as Great Western, from storage.

7. On May 11, 1977, the Presiding Administrative Law Judge issued an initial decision. On June 30, 1977, the Commission modified that decision and rejected Great Western's contention that petitioner had violated its certificates of public convenience and necessity authorizing serv-

ice to reat Western. On March 13, 1979, the Presiding
Admi trative Law Judge issued his Phase II decision,
where he found that petitioner's tariffs were unlawful
only t he extent that they permitted increased service to
new o xisting customers at the expense of other existing
custon s. Upon the filing of exceptions to his decision, the
matte vill be presented to the Commission for a final
opinio In addition, the Presiding Administrative Law
Judge is not issued an initial decision in this proceeding
with r pect to the justness and reasonableness of the pri-
ority service categories contained within the tariffs.

8. I January 1978, Great Western initiated a suit
again petitioner and Northern Natural Gas Company,
Inc., i the District Court, Thirteenth Judicial District,
State Colorado, seeking to recover damages allegedly
incurr by reason of interruptions of service claimed to
be in each of the terms of the contract between itself
and tl defendants. A copy of that complaint is attached
as Ex bit B. The issues which must be resolved in Civil
Actio No. 13503 include all of the issues now pending
before ie Commission in Docket No. RP76-90.

9. S rtly after the commencement of the suit in the
Thirte th Judicial District, petitioner filed a motion to
dismi based on lack of jurisdiction of the court over
the p cipal issues in the case and requesting that fur-
ther ceedings be stayed pending a decision on those
issues the Commission. This motion was overruled on
Augu 11, 1978. Thereafter, while discovery was still in
progr . Great Western filed a motion for partial sum-
mary lgment on the issue of petitioner's liability. Peti-
tioner sponded to the motion by asserting that disputed
issues fact remained to be decided and again asserted
the su emacy of the existing federal regulation and the
exclus and primary jurisdiction of the Commission to
detern e the principal issues. On January 21, 1979, the
Distri Court granted Great Western's motion for partial

BEST AVAILABLE COPY

summary judgment on common law grounds without regard or reference to the Natural Gas Act, and rules and regulations thereunder, or the certificates of convenience and necessity and the tariffs issued by and filed with the Commission. A copy of the District Court's order is attached as Exhibit C. A motion to reconsider filed by petitioner was denied by the court on March 26, 1979.

On April 23, 1979, petitioner filed in the District Court a motion renewing its challenge to the court's jurisdiction and petitioner's request that the issues be referred to the FERC for its consideration and decision. A memorandum was filed in support of that motion. A copy of that memorandum is attached as Exhibit D. In addition, the FERC through its solicitor filed a brief *amicus curiae* fully supporting petitioner's petition. A copy of that brief is attached as Exhibit E. By order dated June 8, 1979, and filed June 14, 1979, petitioner's motion was denied. A copy of the order denying said motion is attached as Exhibit F. Having exhausted its remedies in the District Court, petitioner files this petition for writ of prohibition.

10. As a natural gas company within the meaning of the Natural Gas Act, petitioner is and has been at all pertinent times subject to the rules, regulations and orders of the Commission in the exercise of its jurisdiction under the Natural Gas Act and specifically to the lawfulness of the terms and conditions of its service to its customers. The orders of the state district court and the present posture of this case threaten and will inevitably lead to violation of the Natural Gas Act in the following respects:

(a) Compliance with the orders of the district court respecting liability will result in an undue preference to Great Western over other customers of petitioner, in violation of Section 4(b) of the Natural Gas Act (15 U.S.C. §717(c).

(b) The actions of the trial court deny to the FERC the ability and jurisdiction to carry out its responsibility under Sections 4, 5 and 7 of the Natural Gas Act and threaten the whole federal scheme of regulation under that Act. (15 U.S.C. § 717, *et seq.*)

(c) The actions of the district court deny to petitioner the immunities and protections afforded it as a regulated utility under the Natural Gas Act.

(d) The orders of the FERC will be evaded and circumvented in violation of the Natural Gas Act and contrary to the spirit thereof.

(e) Petitioner will be subject to great cost and expense in further defending this action in a court which does not have jurisdiction of the issues involved and which, accordingly, can render no lawful judgments thereon.

The District Court of the Thirteenth Judicial District, State of Colorado, by denying petitioner's motions seeking reference to the FERC of issues and questions over which the Commission has exclusive and primary jurisdiction, and by declining to give any recognition to the supreme law of the land, is exceeding its jurisdiction for the reasons set forth herein and as more fully discussed in the memorandum supporting this petition. Unless stayed and prohibited the District Court will continue to improperly assert jurisdiction over the issues under consideration by the FERC.

WHEREFORE, petitioner prays that this Court:

(1) Issue an order staying the proceedings in the District Court during the consideration of the petition; and

(2) Issue a writ of prohibition to prevent the District Court, Thirteenth Judicial District, State of Colo-

rado, from exercising exclusive and primary jurisdiction over the issues involved in Civil Action No. 13503, "The Great Western Sugar Company v. Northern Natural Gas Company, Inc.

Respectfully submitted,

HERSHBERGER, PATTERSON, JONES & ROTH

By /s/ RICHARD JONES
Richard Jones
700 Farm Credit Banks Building
Wichita, Kansas 67202
316 - 263-7583

CLARK, MARTIN AND PRINGLE

By /s/ JAMES A. CLARK [1956]
James A. Clark
500 Capitol Life Center
Denver, Colorado 80203
303 - 839-1312

Attorneys for Petitioner

APPENDIX K

IN THE SUPREME COURT
OF THE STATE OF COLORADO

No. 79SA269

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.,
a Kansas corporation,
Petitioner,

v.

DISTRICT COURT, Thirteenth Judicial District,
State of Colorado,
Respondent.

ORIGINAL PROCEEDING

Upon consideration of the Petition for Writ of Prohibition filed in the above cause, together with the Brief in Support thereof and Respondent's Brief in Opposition thereto, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 21, 1979.

xc:

Richard Jones, Esq.
HERSHBERGER, PATTERSON, JONES
& ROTH
700 Farm Credit Banks Bldg.
Wichita, KA 67202

James A. Clark, Esq.
CLARK, MARTIN AND PRINGLE
500 Capitol Life Center
Denver, CO 80203

Hardin Holmes, Esq.
Kenneth L. Starr, Esq.
Jeffrey Reiman, Esq.
SHANK, IRWIN & HOLMES
717 Seventeenth Street, Suite 2440
Denver, CO 80202

T. N. Wright
A. R. Madigan
2223 Dodge Street
Omaha, NE 68102

Thomas C. Stifler, Esq.
GRESHAM, STIFLER GENTRY & COVELL
404 Mining Exchange Bldg.
P. O. Box 759
Colorado Springs, CO 80901

George E. Clough
P. O. Box 5308
Denver, CO 80217

Northern Natural Gas Co.
P. O. Box 338
25 Main Place
Council Bluffs, Iowa 51501

Charles W. Dreager, Esq.
KREAGER & DOWIS
229 Foote Building
Box 350
Sterling, CO 80751

[Supreme Court State of Colorado Certified to be a full, true and correct copy JUN 22 1979 DAVID W. BREZINA Clerk of the Supreme Court By /s/ JOAN M. RHYNE Deputy Clerk Court Seal]

Office - Supreme Court, U.S.
FILED
MAY 23 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KN ENERGY, INC.,

Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF IN OPPOSITION OF THE GREAT WESTERN SUGAR COMPANY

HARDIN HOLMES
KENNETH L. STARR
JEFFREY REIMAN
HOLMES & STARR
717-17th St., Ste. 2440
Denver, CO 80202
(303) 292-1500

MELVIN RICHTER
1050 17th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 331-1194
Counsel of Record

Attorneys for
The Great Western Sugar Company

May, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

31 pp

QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (Commission) has exclusive jurisdiction, such as to oust a state court of jurisdiction, to adjudicate a suit for breach of contract against a natural gas company subject to regulation under the Natural Gas Act, arising from the gas company's unilateral change in its method of interrupting delivery of gas, where the gas company was not suffering from a gas supply shortage and had not implemented a curtailment plan approved by the Commission.

2. Whether, in a suit for breach of contract brought against a natural gas company subject to regulation under the Natural Gas Act, the Colorado courts abused their discretion in declining to refer any questions to the Commission under the doctrine of primary jurisdiction, where the courts determined that they could interpret applicable certificates of public convenience and necessity, Commission policy orders, and the gas company's tariffs solely as a matter of law.

3. Whether an award of damages against a gas company resulting from its breach of contract with a customer constitutes a prohibited undue preference or a violation of the filed rate doctrine.[1]

---

[1]The statement required by Rule 28.1 is set out in the Appendix pp. 1a-2a. Contrary to KN's assertion (Pet., p. 1, fn. 2), neither the Commission nor the Interstate Natural Gas Association of America (INGAA) participated as parties in the Supreme Court of Colorado. The Commission did not file a petition for a writ of certiorari; nor did INGAA file a petition to intervene. Rather, both filed only *amicus* briefs in support of certiorari. Neither filed a brief on the merits once the Colorado Supreme Court excluded the primary jurisdiction question from its grant of certiorari.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF FACTS	2
BACKGROUND	2
PROCEEDINGS IN COLORADO COURTS	5
ARGUMENT	10
I. THE COMMISSION DOES NOT HAVE "EXCLUSIVE AND CONTINUING JURISDICTION" OVER THIS BREACH OF CONTRACT DISPUTE	10
II. THE COLORADO COURTS PROPERLY REFUSED TO REFER ANY ISSUES TO THE COMMISSION	13
A. The Doctrine of Primary Jurisdiction Does Not Assist KN	13
B. None Of The Commission Materials Relied On By KN Operated To Relieve It Of Its Contract Obligations To GW	16
1. Commission Certificates Issued To KN	16
2. Commission Policy Statements	18
3. KN's Tariffs	19
III. A DAMAGE AWARD FOR BREACH OF CONTRACT NEITHER RESULTS IN AN UNLAWFUL UNDUE PREFERENCE NOR VIOLATES THE FILED RATE DOCTRINE	21
CONCLUSION	23

TABLE OF AUTHORITIES

COURT CASES	Page
Brown v. *Gerdes*, 321 U.S. 178, (1944)	13
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976)	14
Federal Power Commission v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972)	11
Federal Power Commission v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956)	20
Federal Power Commission v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976)	11
Great Northern Ry. Co. v. *Merchant's Elevator Co.*, 259 U.S. 285 (1922)	13
Hercules Inc. v. *Federal Power Commission*, 552 F.2d 74 (3d Cir. 1977)	12
Kansas-Nebraska Natural Gas Co., Inc. v. *Consumers Public Power Dist.*, 179 Neb. 687, 140 NW.2d 10 (1966)	11
Nader v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976)	15, 16
Pacific Gas & Electric Co. v. *Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1976)	12, 16
Pan American Petroleum Corp. v. *Kansas-Nebraska Natural Gas Co., Inc.*, 297 F.2d 561 (8th Cir.) *cert.* denied, 370 U.S. 937 (1962)	11, 22
Pan American Petroleum Corp. v. *Superior Court*, 366 U.S. 656 (1961)	11
Panhandle Eastern Pipe Line Co. v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947)	13
Regents of University System of Georgia v. *Carroll*, 338 U.S. 586 (1950)	15
Testa v. *Katt*, 330 U.S. 386 (1947)	13
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956)	11, 14-15, 16, 20
United States v. *Western Pacific R. Co.*, 352 U.S. 59 (1956)	13, 14

Table of Authorities Continued

Page

W.R. Grace and Co. v. *Local Union 759*, 461 U.S. 757 (1983) 14

COMMISSION DECISIONS

Kansas-Nebraska Natural Gas Co., Inc., 30 FPC 356 (1963) 3

Kansas-Nebraska Natural Gas Co., Inc., 58 FPC 2890 (1977) 5, 12

Kansas-Nebraska Natural Gas Co., Inc., 59 FPC 854 (1976), *aff'd*, 59 FPC 851 (1977) 8, 12

Kansas-Nebraska Natural Gas Co., Inc., 59 FPC 1776 (1977) 12

Kansas-Nebraska Natural Gas Co., Inc., 6 FERC ¶63,055 (1979) 4, 8, 12, 20

Kansas-Nebraska Natural Gas Co., Inc., 17 FERC ¶61,102 (1981) 4, 12

Kansas-Nebraska Natural Gas Co., Inc., 30 FERC ¶63,049 (1985) 10, 12, 14

MISCELLANEOUS

Colo. R. Civ. P.

Rule 59(f) 21

Rule 59(h) 21

Natural Gas Act, 15 U.S.C. 717 2

Section 7(a), 15 U.S.C. 717f(a) 16

Order No. 431, 45 FPC 570 (1971) 16, 18, 19

Order No. 467B, 49 FPC 583 (1973) 12, 19

Order No. 498, 50 FPC 1954 (1973) 16, 18, 19

5 U.S.C. § 557 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KN ENERGY, INC.,

Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

---

BRIEF IN OPPOSITION OF THE GREAT WESTERN SUGAR COMPANY

OPINIONS BELOW

The opinion of the Colorado Supreme Court (Pet. App., pp. 1a-32a) is unreported. The opinion of the Colorado Court of Appeals (Pet. App., pp. 33a-56a) is reported at 661 P.2d 684 (1982).

JURISDICTION

The opinion of the Colorado Supreme Court was issued January 14, 1985 (Pet. App., p. 1a). Petitioner's timely application for rehearing was denied on February 6, 1985. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT OF FACTS

Background: Petitioner, KN Energy, Inc. (KN),[2] transports and sells natural gas in interstate commerce and, as such, is subject to regulation by the Federal Energy Regulatory Commission,[3] under the Natural Gas Act, 15 U.S.C. § 717 *et seq.* Respondent, The Great Western Sugar Company (GW), has been engaged in the business of processing sugar beets into sugar. GW purchased natural gas directly from KN for its factories at Ovid and Sterling, Colorado and Scottsbluff, Nebraska. For its plant at Goodland, Kansas, GW purchased gas from the Peoples Division of Northern Natural Gas Company (Northern) which, in turn, was supplied by KN.

Pursuant to Commission certificates of public convenience and necessity (certificates) and contracts which date back to 1955 and which were renewed throughout the relevant time period without material change, KN sold natural gas to GW under interruptible contract provisions which provided in pertinent part:

> KN . . . in its absolute discretion and without liability to Buyer for damages or otherwise, shall have the right to . . . interrupt . . . delivery of gas to Buyer hereunder as and whenever from time to time KN is required to do so in order to meet the demands of domestic and commercial users or other users having a higher priority of service. (Pet. App., p. 3a).

---

[2]Formerly Kansas-Nebraska Natural Gas Company, Inc.

[3]We refer to the Federal Energy Regulatory Commission and its predecessor the Federal Power Commission as the Commission.

Whenever service was "interrupted" under this provision, GW was required to use more expensive fuel oil in its factories.

From 1955 until November 7, 1973, KN determined when to interrupt under these contract provisions by comparing its anticipated demand over the next 24 to 36 hours with its anticipated supply, including all gas available from its storage facilities.[4] As a result, from the time that its first storage facility commenced operations in 1964 to November 7, 1973, KN used storage gas as well as flowing gas to meet the needs of all of its customers, interruptible as well as firm. Even when the comparison indicated a need for some interruption, KN would still deliver gas to as many interruptible customers as possible. The Colorado courts called this KN's "historical 24 to 36 hour analysis." See Pet. App., p. 5a.

On November 7, 1973, KN abandoned its historical 24 to 36 hour analysis without seeking to amend its contracts with GW and without seeking the approval or authorization of the Commission. See Pet. App., p. 5a. KN unilaterally embarked upon a new policy for delivering gas to interruptible customers ("the storage withdrawal interruption policy"), under which gas deliveries to interruptible customers were cut off whenever, and for as long as, KN was withdrawing gas from storage, even when KN could otherwise have served those customers by drawing on all sources of supply as it had traditionally done under the historical 24 to 36 hour analysis.

Under the historical 24 to 36 hour analysis, KN had interrupted service to GW on an average of about 5 days per

---

[4]KN's first storage facility (Huntsman) was authorized by a Commission certificate issued in 1963. *Kansas-Nebraska Natural Gas Co., Inc.*, 30 FPC 356 (1963).

"campaign," the approximately four month period during which sugar beets are processed into sugar. Under the storage withdrawal interruption policy, those interruptions increased dramatically to an average of about 50 per campaign during the 6 year period at issue in the Colorado lawsuit. KN readily admitted in the Colorado courts that this increase resulted directly from its adoption of the storage withdrawal interruption policy.

Almost two years after adopting the new policy, on August 29, 1975, KN unilaterally filed with the Commission tariff sheets which stated (Pet. App., pp. 23a-25a):

> Seller shall not be required to remove gas from gas storage reservoirs for delivery to consumers served by Seller on an interruptible basis or under interruptible service rate schedules in this Tariff.

The Commission suspended these tariff provisions for the statutory period of five months and then permitted them to become effective as of March 14, 1976, pending final Commission approval. Pet. App., pp. 38a-39a.

A hearing on the lawfulness of these provisions (along with further tariff sheets filed in December 1976 establishing priorities of service) was conducted in Commission Docket No. RP76-90. After extensive proceedings in that Docket, including an Initial Decision of the Administrative Law Judge finding KN's tariff to be unlawful, 6 FERC ¶ 63,055 (1979), the Commission by order issued November 2, 1981, 17 FERC ¶ 61,102 (1981), accepted a settlement by the parties terminating the proceeding. In accepting the settlement, the Commission twice expressly pointed out that:

> The approval of this Stipulation and Agreement shall not constitute approval of or precedent regarding any

> principle or issue in these proceedings (17 FERC at pp. 61208-09, 61210).

When the issue of KN's storage withdrawal interruption policy arose in Docket No. RP76-90, the Administrative Law Judge concluded that the Commission had not previously authorized the policy and that the courts would have to resolve its propriety:

> As for the pipeline's claim that it has been cutting off service to some customers for substantial periods of time even before now, it has certainly not done this pursuant to authority granted by the FPC. Instead, the pipeline apparently has proceeded on the basis of contracts or a tariff on file with a state agency allowing it to cut off service to "interruptible" customers. It remains for the Courts to decide whether these contracts or the state tariff actually give the pipeline unlimited authority, as it seems to claim, to cut off service indefinitely to these interruptible customers. Certainly on one occasion, at least, it was ruled that the pipeline lacked such authority.

58 FPC 2899, 2905-06 (1977) (footnote and citation omitted). Although exceptions were taken from this Initial Decision, *see* 5 U.S.C. §557, KN, GW, and the Commission's Staff did not take issue with the findings quoted above; and although the Commission reversed other portions of that Decision, 58 FPC 2890 (1977), the Commission, which had the power to reverse or modify those findings on its own motion, 5 U.S.C. §557(b), did not do so. GW accordingly sued KN in the Colorado courts.

Proceedings In Colorado Courts: GW filed its complaint against KN in January 1978, claiming that KN's unilateral abandonment of its historical 24 to 36 hour analysis in favor of the storage withdrawal interruption policy constituted a

breach of KN's contracts with GW. Pet. App., p. 6a.[5] On May 2, 1978, KN moved the trial court to refer portions of the dispute to the Commission under the doctrine of primary jurisdiction. Pet. App., p. 6a. The trial court denied this motion on August 11, 1978, and subsequently also denied KN's motions to reconsider.[6]

Thereafter, GW moved for partial summary judgment on the ground that KN's November 1973 unilateral adoption of the storage withdrawal interruption policy constituted a breach of KN's contracts for service to GW's Ovid, Sterling, and Scottsbluff factories. Pet. App., p. 6a. KN also moved for summary judgment, asserting that certain Commission tariffs, certificates, and orders required KN's change of policy. Pet. App., p. 7a.[7] The trial court granted GW's motion but denied KN's motion, ruling that the applicable

---

[5]Although GW's complaint as filed also alleged fraud and named Northern as a defendant, the issues before the Colorado Supreme Court involved only contract claims by GW against KN.

[6]KN filed motions for reconsideration of the primary jurisdiction issue in February and April 1979. The Commission filed an *amicus* brief supporting the latter motion. However, the trial court denied both motions. In June 1979, two weeks before the scheduled trial date, KN sought a writ of prohibition from the Colorado Supreme Court, arguing that the trial court erred in failing to refer the matter to the Commission. This petition was denied. Also in June 1979, KN sued GW in the United States District Court for the District of Nebraska, Docket No. CV 79-L-164, seeking to enjoin trial by virtue of the trial court's alleged error on the primary jurisdiction issue. KN's Motion for a Temporary Restraining Order was denied shortly thereafter, and the case went to trial as scheduled on July 2, 1979.

[7]Despite having argued previously that only the Commission could interpret these tariffs, certificates, and orders, KN advanced no reason (either its motion for summary judgment or in its memorandum opposing GW's motion) why the trial court was incapable of reviewing those agency directives and interpreting their plain language as a matter of law.

contracts did not allow KN unilaterally to withhold any sources of supply from service to GW and that this obligation was not modified in any way by the various Commission tariffs, certificates, and orders cited by KN. Pet. App., p. 7a.[8]

A jury trial was held on the issue of GW's damages after that summary judgment ruling, as well as a second ruling affecting GW's Goodland plant. Pet. App., pp. 7a, 46a-48a.[9] The jury awarded GW damages in excess of $1,000,000 for its four plants. Pet. App., p. 8a.[10]

Although KN has suggested that it was simply protecting its high priority customers by adopting the storage with-

---

[8]As a separate basis for holding that KN had breached its contracts, the trial court also determined that KN was obligated to employ the same method it had used for 18 years before November 1973 in determining when to interrupt. Pet. App., p. 44a. This ruling was based in part on depositions of KN's personnel as to how they historically had acted under contract with GW, and in part on KN's express representations to GW about using storage gas in serving GW's needs.

[9]The trial court held that by interrupting service pursuant to the storage withdrawal interruption policy, KN had breached the service agreement under which KN supplied gas to Northern for ultimate distribution, among others, to the Goodland plant, and that GW could be a third party beneficiary of that service agreement, Pet. App., pp. 7a, 46a. The jury specifically found that KN and Northern intended to confer benefits on GW among others. Pet. App., p. 46a. KN does not contend here that these factual findings were erroneous.

[10]Contrary to KN's assertion (Pet., pp. 15-16), the trial court (as well as the Colorado appellate courts) recognized KN's contractual discretion to interrupt service to GW under appropriate circumstances, and permitted KN to present evidence justifying any interruption of service in an effort to reduce GW's damages (see Pet. App., pp. 54a-55a). KN, however, did not introduce any evidence justifying any interruption. *Id.*

drawal interruption policy, the evidence presented to the trial court and jury—out of the mouths of KN's own executives and directors—overwhelmingly showed that despite some declines in reserves and deliverability, KN had ample gas supplies to continue operating under the historical 24 to 36 hour analysis; but that "economics were a factor" in KN's unilateral adoption of the new policy because interruptible sales were "thin-margin sales" and storage gas was "expensive gas."[11]

Following denial of their post-trial motions, both KN and GW took appeals to the Colorado Court of Appeals. Pet. App., pp. 33a-56a. In its opinion, the Court of Appeals *inter alia* rejected KN's contention, supported by the *amicus* brief filed by the Commission, that the trial court had abused its discretion by failing to refer certain issues to the Commission under the doctrine of primary jurisdiction. The Court reasoned that the issues presented were common law contract claims, and that the agency directives cited by KN could be interpreted as a matter of law. Pet. App., p. 42a.

The Court of Appeals also affirmed the trial court's holding that in switching from the historical 24 to 36 hour analysis to the storage withdrawal interruption policy, KN

[11]*See also Kansas-Nebraska Natural Gas Co., Inc.*, 59 FPC 854, 858-59 (1976), *aff'd*, 59 FPC 851 (1977) (precluding KN from abandoning service to its lowest priority customers because it "had the unquestioned ability to meet the full requirements of all its customers for many years to come." The Administrative Law Judge there concluded that KN's abandonment application was no more than a thinly disguised effort to reduce sales with a low profit margin); *Kansas-Nebraska Natural Gas Co., Inc.*, 6 FERC ¶ 63,055 at 65,322 (1979) (KN's standby curtailment plan found unlawful in that KN had ample gas supplies and was using the plan to discriminate against its interruptible customers. The Administrative Law Judge, alluding to the fact that interruptible customers furnish less revenue to KN than the firm users, concluded that the plan was "motivated by Kansas-Nebraska's pocketbook").

had breached its contracts with GW. Pet. App., pp. 43a-45a. Further, it ruled that none of the Commission directives relied on by KN authorized or required KN's change in policy. Pet. App., pp. 37a-38a, 45a.[12]

Following the Court of Appeals' denial of KN's application for rehearing on July 15, 1982, KN on September 16, 1982 filed a petition for a writ of certiorari with the Supreme Court of Colorado urging error by the Court of Appeals in declining to direct a reference to the Commission under the doctrine of primary jurisdiction and in making certain substantive rulings. The Commission and INGAA filed *amicus* briefs supporting certiorari on the primary jurisdiction question. *See* n.1, *supra*. The Colorado Supreme Court on March 21, 1983 denied certiorari on the primary jurisdiction question, but granted certiorari on the substantive questions raised in KN's petition.

By opinion issued January 14, 1985, Pet. App., pp. 1a-32a, the Colorado Supreme Court affirmed the decision of the Court of Appeals, holding *inter alia* that the various Commission directives relied on by KN neither imposed an obligation requiring the storage withdrawal interruption policy nor immunized KN from contract liability. Pet. App., pp. 15a-25a.[13]

---

[12]On GW's own appeal, the Court of Appeals held that KN did not present any evidence justifying any of its interruptions to GW (*see* n.10 *supra*), and that GW was therefore entitled to a directed verdict on the issue of its damages for each of the roughly 250 days on which interruptions occurred during the relevant time period. Pet. App., pp. 54a-56a.

[13]KN alludes (Pet., p. 10, fn.12) to a declaratory judgment proceeding which it initiated with the Commission on August 5, 1982, after the Colorado Court of Appeals' denial of rehearing and before KN filed its certiorari petition with the Colorado Supreme Court. Since KN has alluded to that proceeding, it is only appropriate to note that

ARGUMENT

No question of general importance is presented. This is a common law breach of contract dispute between a gas company and one of its customers. While the gas company invoked federal law in its defense, the Colorado courts were competent to apply and interpret that federal law, and did so correctly. The petition for a writ of certiorari should be denied.

I. The Commission Does Not Have "Exclusive And Continuing Jurisdiction" Over This Breach Of Contract Dispute.

Despite KN's conclusory argument (Pet., pp. 13-15) about the Commission's "exclusive and continuing jurisdiction", this Court has already held that state courts have jurisdiction to resolve breach of contract disputes involving the sale of natural gas:

> The rights as asserted by [the plaintiff] are traditional common law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas.

---

based on the separate record there made, the Administrative Law Judge on February 27, 1985 issued his Initial Decision agreeing in *every* substantive respect with the findings and conclusions of the Colorado courts. 30 FERC ¶ 63,049 (1985). But both because the agency record is distinct from the record made in the Colorado proceeding and because the Colorado courts correctly exercised their discretion not to refer any aspect of the dispute to the Commission, GW submits that the ongoing Commission declaratory judgment proceeding, *regardless of its outcome*, is of no moment for purposes of this Court's consideration of KN's Petition.

Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 663 (1961).[14]

In the natural gas industry, arrangements are "established initially by contract," *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 339 (1956), the terms of which cannot be abrogated unilaterally by the gas company. *Id.*, at 339-40. The Commission's power to modify a gas company's contractual obligations (and thereby frustrate "the integrity of contracts") is limited to those special circumstances where it is "necessary in the public interest." *Id.*, at 344.

To be sure, curtailment is one situation where the courts have considered it "necessary in the public interest" for the Commission to abrogate inconsistent contractual obligations. *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). When a gas company is experiencing curtailment, it is suffering from an "inadequate supply of natural gas", *id.*, at 623; *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976), and the Commission therefore had the

---

[14]*See also Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., Inc.*, 297 F.2d 561, 567-68 (8th Cir.), *cert. denied*, 370 U.S. 937 (1962), where KN convinced the courts that the Commission did not have "exclusive jurisdiction" but, rather, that the courts had jurisdiction over breach of contract disputes involving the sale of natural gas because "the Natural Gas Act does not give the right to gas companies to abrogate their contract obligations." Moreover, despite its current claim that the Commission has "exclusive and continuing jurisdiction" over all issues involving the transportation of natural gas, KN invoked the courts in suing one of its interruptible customers to obtain a declaratory judgment as to its rights and obligations in transporting gas to that customer. *Kansas-Nebraska Natural Gas Co., Inc. v. Consumers Public Power Dist.*, 179 Neb. 687, 140 NW.2d 10 (1966).

authority to devise a reasonable way to ration those limited gas supplies. *Id.; see also* Order 467B, 49 FPC 583 (1973).

In contrast, the Commission has, time and again, recognized that KN did not experience any gas supply shortage during the relevant time period. *E.g., Kansas-Nebraska Natural Gas Co., Inc.*, Docket No. CP74-299, 59 FPC 851, 852-53 (1977); *Kansas-Nebraska Natural Gas Co., Inc.*, Docket No. RP76-90, 59 FPC 1776, 1780-81 (1977); *see also* 59 FPC 854 (1976); 58 FPC 2899 (1977); 6 FERC ¶ 63,055 (1979); and 30 FERC ¶ 63,049 (1985) (holding that KN had adequate gas supplies, that indeed KN had perhaps the best gas supply of any gas company in the Nation, and that KN was not experiencing curtailment at any time during the relevant time period).[15]

Nor is the Commission's jurisdiction over this dispute somehow "exclusive" merely because it issued certain direc-

[15]Although KN did file a curtailment plan in 1976, that plan was never approved by the Commission. *Kansas-Nebraska Natural Gas Co., Inc.*, 17 FERC ¶ 61,102 (1981); 6 FERC ¶ 63,055 (1979), Pet. App., pp. 23a-25a. Moreover, in light of KN's ample gas supply, the Commission accepted the filing of the plan on only a standby basis, to be available should KN suffer a gas supply deficiency at some future time. *See Kansas-Nebraska Natural Gas Co., Inc.*, 58 FPC 2890, 2892 (1977); 59 FPC 1776, 1780-81 (1977); *see also* Pet. App., p. 25a, n. 14. The Commission in those rulings expressly distinguished between KN's "filing" of a curtailment plan on a standby basis and KN's "implementation" of that plan, which never validly occurred. *Id.; see also Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 42 (D.C. Cir. 1974); *Hercules Inc. v. Federal Power Commission*, 552 F.2d 74, 87-88 (3rd Cir. 1977) (both holding that a curtailment plan cannot serve to override inconsistent contractual obligations until the gas company is experiencing curtailment and its curtailment plan has been approved by the Commission); 6 FERC ¶ 63,055 at 65,320 (1979) (distinguishing between "interrupting" service where there is an adequate gas supply but not enough pipeline capacity, which was the situation faced by KN, and "curtailing" service because of inadequate gas supplies, which KN never did).

tives affecting KN's service to GW. The power to issue a directive has never carried with it, without more, the exclusive power to interpret it. *See United States v. Western Pacific R. Co.*, 352 U.S. 59, 65-66 (1956); *Great Northern Ry. Co. v. Merchant's Elevator Co.*, 259 U.S. 285 (1922) (both holding that courts are competent to interpret an agency's directives when the issues do not involve the agency's special expertise and involve solely questions of law). That is because the issuance of a law or directive, *i.e.*, a legislative function, has historically been considered different from the interpretation of it, *i.e.*, an adjudicative function. *Cf. Brown* v. *Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring).[16]

Thus, although *Louisiana Power & Light* held that the Natural Gas Act gave the Commission jurisdiction to devise curtailment plans, such jurisdiction is not so broad as to be primary or exclusive in the sense that, in the absence of curtailment, it ousts a *court* of jurisdiction to entertain a damage action for breach of contract.

II. The Colorado Courts Properly Refused To Refer Any Issue To The Commission.

A. The Doctrine of Primary Jurisdiction Does Not Assist KN.

Although KN speaks in terms of the Commission's "exclusive jurisdiction", it argues (Pet., p. 17) that certain issues

---

[16]Moreover, the fact that a federal regulation overrides a conflicting state regulation under the Supremacy Clause (as this Court held in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507 (1947), relied on by KN (Pet., pp. 13-14)) does not deprive the state courts of jurisdiction. It simply means the state courts must apply the federal directive in resolving the dispute. *See Testa v. Katt*, 330 U.S. 386 (1947) (state courts obligated to enforce federal law).

"ought to have been referred to the agency", thereby suggesting that it is actually relying on the doctrine of primary jurisdiction. But since that latter doctrine is premised upon the notion that GW's contract claim is "originally cognizable in the courts", *United States v. Western Pacific R. Co.*, 352 U.S. 59, 64 (1956), KN's reliance on that doctrine undercuts its contention that the Commission has "exclusive jurisdiction" over this dispute.

KN argues (Pet., pp. 17-18) that the Colorado courts used a "mistaken approach" of inquiring into whether the Commission's directives were "inconsistent" with KN's contract obligations. According to KN, a correct approach—and the one which the Commission would presumably use if the matter were referred to it[17]—is to inquire whether the Commission's directives merely permitted the storage withdrawal interruption policy. In fact, it is KN's approach, not that of the Colorado courts, which is "mistaken": this Court has consistently held that a regulated company cannot abrogate its common law and other obligations merely by complying with a regulatory directive where compliance is not required or where the company could have avoided the directive's issuance or effect. *E.g., W. R. Grace and Co. v. Local Union 759*, 461 U.S. 757 (1983) (conciliation agreement with EEOC does not abrogate an employer's contractual obligations under a collective bargaining agreement); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (tariff which obligates public utility to distribute free light bulbs does not exempt the utility from antitrust liability where utility was actively involved in drafting tariff);

---

[17]Unfortunately for KN, the Commission's Administrative Law Judge presiding over the pending declaratory judgment proceeding, in rejecting all of KN's substantive contentions, *see* n. *13*, *supra*, analyzed these issues in the same "mistaken" way as did the Colorado courts. *See* 30 FERC ¶ 63,049 (1985).

United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) (gas company cannot abrogate contractual obligations by unilaterally filing inconsistent tariff provision); *Regents of University System of Georgia v. Carroll*, 338 U.S. 586 (1950) (FCC licensee who repudiates a contract at the specific behest of Commission as a prerequisite to obtaining renewal of broadcasting license is still liable for contract breach).

The division of court and agency responsibility, which the doctrine of primary jurisdiction is designed to foster, is graphically illustrated in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). Noting that the plaintiff was seeking to recover damages incurred as a result of an airline's failure to disclose its overbooking practices, this Court set aside an agency referral directed by the Court of Appeals, finding that none of the issues involved related to the reasonableness of the airline practices and, therefore, the issues involved were within the conventional competence of the courts. *Id.*, at 305-6.

Here as well, no agency input was needed to resolve the issues involved. GW's complaint in the Colorado litigation was that KN had breached its contracts by unilaterally switching the basis on which it interrupted service to GW. There was no question presented as to the reasonableness of KN's underlying obligations. To the contrary, the basic question presented involved construction of the contract language dealing with interruption of service. Indeed, GW was directed to the courts by the Administrative Law Judge in RP76-90 to resolve this very issue.

Likewise, agency input was not *required* by the fact that KN invoked various Commission directives by way of defense. Again, whatever the Commission's jurisdiction may be with regard to the promulgation or reasonableness of

such agency directives, the questions here, as KN admits (Pet., p. 17), related solely to their interpretation and applicability to the instant situation as a legal matter. Here, as in *Nader*, the Colorado courts were competent to decide these questions without agency assistance.

B. None of the Commission Materials Relied On By KN Operated To Relieve It Of Its Contract Obligations To GW.

KN claims (Pet., pp. 17-24) that its storage withdrawal interruption policy was proper in light of certain of the Commission's orders and certificates, as well as KN's tariffs. Even if those directives authorized that policy—and it is clear that they do not as discussed below—they do not protect KN under the facts of this case. The "orders" were by their own terms non-binding statements of general policy;[18] the certificates—the issuance of which KN actively obtained—could not protect KN since, under the Natural Gas Act, the Commission has "no authority" to issue a certificate "when to do so would impair [the gas company's] ability to render adequate service to its customers", 15 U.S.C. § 717f(a); and the courts specifically found that the tariffs were consistent with the contracts and in any case did not override the contracts because they were filed unilaterally, Pet., App., pp. 22a-24a. *See United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), factual findings which KN does not contest.

KN's argument (Pet., pp. 3, 17-24) that the holdings of the Colorado courts conflicted with its obligations under the Natural Gas Act does not withstand a review of the Commission directives that KN cites.

---

[18]*See* Order No. 431, 45 FPC 570 (1971); Order No. 498, 50 FPC 1954 (1973); *see also Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 35-38 (D.C. Cir. 1974) (discussing the non-binding nature of these general statements of policy).

1. *Commission Certificates Issued To KN*: KN contends (Pet., pp. 15, 18) that the holdings of Colorado courts in effect convert its interruptible service to GW to firm service and therefore violate the condition, in the certificate issued by the Commission for service to GW's Ovid plant, prohibiting firm service to interruptible customers without further Commission authorization.

But in so arguing, KN misstates the rulings of the Colorado courts. As noted by the Colorado Supreme Court (Pet. App., p. 16a):

> The dispute in the case focuses not on whether the contract permits interruptible service but rather on the manner in which interruptions are to be implemented.

In other words, prior to the adoption of the storage withdrawal interruption policy, KN provided service to GW's plants under the historical 24 to 36 hour analysis which resulted in only infrequent interruptions. A finding that the greatly increased interruption resulting under that new policy constituted a breach of contract is directed only to the extent of the interruptions, and does not convert interruptible to firm service.

KN also argues (Pet., p. 19) that the Commission issued certificates for storage fields to enable KN to serve firm customers and therefore the gas from these fields could not legally be used to serve interruptible customers. But prior to KN's adoption of the storage withdrawal interruption policy in 1973, KN had, in the normal course and without suggesting any impropriety, withdrawn gas from storage as needed to serve interruptible customers. Not only is there no suggestion in any certificate that the interruptible customers are not to be served by the certificated facilities, but, as discussed above, the Natural Gas Act precludes the

Commission from issuing certificates that result in dramatically reduced service (such as resulted from the storage withdrawal interruption policy, *see* p. 4, *supra*) to existing customers.

Finally, KN urges (Pet., p. 19) that the Commission certificate issued for the Big Springs Storage Field had indicated that the field was needed to help KN meet its future peak requirements. But such purpose is not inconsistent with serving interruptible customers out of storage when the gas is available—in contrast to the flat prohibition against such service mandated by the storage withdrawal interruption policy.[19]

2. *Commission Policy Statements*: KN invokes (Pet., p. 20) two statements of general policy issued by the Commission, Order No. 431, 45 FPC 570 (1971), and Order No. 498, 50 FPC 1954 (1973). The plain language of these policy statements rebuts any suggestion that they authorized or required KN's unilateral adoption of the storage withdrawal interruption policy. The policy statements were addressed to gas companies experiencing severe gas supply shortages, not KN. *See* pp. 11-12, *supra*. By their own terms, the policy statements were not binding; did not require gas companies to take any specific action; and certainly did not require them to breach their contracts or unilaterally change their contractual performance. Indeed, Order No.

---

[19]As the Colorado Supreme Court pointed out (Pet. App., p. 17a), in interpreting the certificate's plain language as a matter of law, the Commission's comment on the storage withdrawal interruption policy in its Big Springs orders (also referred to by KN (Pet., p. 19)), "merely recognized KN's unilaterally-imposed policy and was not made a condition to the issuance of [that] certificate."

431[20] provided that gas companies facing supply shortages should file tariff sheets setting out proposed curtailment plans which, "*if approved by the Commission*, will control in all respects notwithstanding inconsistent provisions in sales contracts." 45 FPC at 572 (emphasis supplied). And Order No. 498 merely "requested" that pipelines "consider" taking certain actions "where possible," 50 FPC at 1957, language emphasizing the purely advisory character of the Order.[21]

3. *KN's Tariffs*: The Colorado courts ruled that KN's tariffs filed in 1975 and 1976 did not immunize KN from liability for two independent reasons. One reason was that under the plain language of the tariffs, KN was free to serve interruptible customers even while withdrawing gas from storage. Thus, since there was no conflict between the tariffs' plain language and KN's contractual obligations, the tariffs could not serve as a defense. Pet. App., pp. 20a-25a. KN does not question this ruling, which serves as an independent reason for upholding the Colorado courts' conclusion.

---

[20]Order No. 431 was issued in April 1971, 2½ years before the adoption of the storage withdrawal interruption policy, during which time KN continued to operate under the historical 24 to 36 hour analysis. And Order No. 498, issued in December 1973, after KN unilaterally adopted that policy, hardly constitutes a Commission requirement that the policy be adopted.

[21]KN also relied below on Order No. 467B, 49 FPC 583, 584 (1973) (Pet. App., pp. 19a-20a, 45a). That Order destroys KN's position here, for it recognizes that a gas company which cuts back on service to its customers—without first being in curtailment and operating under a Commission-approved curtailment plan—does so at the "risk of civil liability." As discussed at pp. 11-12 *supra*, KN was never in curtailment during the relevant time period and never operated under an approved curtailment plan.

Instead, KN attacks only the Colorado courts' alternative holding that *if* the tariff[22] were somehow inconsistent with KN's contract obligations to GW, the unilateral nature of its filing would not cause an abrogation of KN's contractual obligations under the *Mobile-Sierra* doctrine.[23] Even here, KN does not question the validity of the courts' factual conclusion (Pet. App., pp. 22a-24a) that the tariff was filed unilaterally. Instead, it contends (Pet. pp. 23-24) only that GW did not raise this argument in the Commission proceedings in RP76-90, and therefore that GW had failed to exhaust its administrative remedies.

But in so arguing, KN improperly assumes that the tariff mandated the storage withdrawal interruption policy—an assumption belied by the Colorado courts' primary holding not questioned by KN here. Moreover, KN ignores the fact that it was KN, not GW, which lost before the ALJ in RP76-90: the ALJ there had held *KN's* tariff invalid and had ruled that *KN* had acted discriminatorily and contrary to its obligations under the Natural Gas Act, *Kansas-Nebraska Natural Gas Co., Inc.*, 6 FERC ¶ 63,055 (1979); and it was *KN* which failed there to challenge the ALJ's finding (even though it seeks to do so here) that issues concerning the storage withdrawal interruption policy should be resolved in the courts. Thus, it was KN, rather than GW, which was in a position of having to exhaust administrative remedies.

---

[22]KN's tariff argument relates to the period after March 14, 1976, when the 1975 tariff was accepted for filing. Prior to that time, KN admittedly had operated under the storage withdrawal interruption policy without any contract amendment or Commission approval. *See* pp. 3-4 *supra*.

[23]*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

Accordingly, if anyone failed to exhaust its administrative remedies, it was KN.[24]

III. A Damage Award For Breach Of Contract Neither Results In An Unlawful Undue Preference Nor Violates The Filed Rate Doctrine.

KN's argument that the Colorado courts violated the filed rate doctrine is raised untimely. KN did not bring that argument to the attention of the Colorado trial court.[25] Under then-existing Colorado procedure, KN had no authority to assert that argument before the Colorado Supreme Court. Rule 59(f), Colo.R.Civ.P. (repealed in 1985).[26]

---

[24]KN's argument also assumes that GW had some administrative "remedy" that it needed to "exhaust". In the courts, GW sought the award of damages for KN's breach of contract during the period 1973-79, a remedy which the Commission has no power to award, particularly for the period before March 1976 when KN's tariff took effect. *See* n.22, *supra*.

[25]KN also did not bring this argument to the attention of the Colorado Court of Appeals.

[26]Former Rule 59(f), Colo.R.Civ.P., states:

No Review Unless Made. The party claiming error in the trial of any case (except as provided in section (h) of this Rule) must move the trial court for a new trial as herein above provided, and the trial court may not dispense with the necessity for filing such a motion but may dispense with oral argument on the motion after it is filed, and only questions presented in such motion will be considered by the appellate court on review; provided, however, that if a motion to alter or amend the judgment is filed it shall, for appellate purpose, be considered as a motion for a new trial.

Rule 59(h), Colo.R.Civ.P., which is referred to in Rule 59(f), states:

When Motion Not Necessary. When final judgment is entered pursuant to motion filed under the grounds stated in Rule 12(b)(1) to (6), inclusive, or after hearing on motion filed pursuant to Rule 12(c) or 56; or after pretrial conference, or after any hearing not involving

Review of this issue is thus barred on an independent state ground.

Contrary to KN's argument (Pet., pp. 25-27), awarding damages to GW for KN's breach of contract does not result in an undue preference or advantage prohibited by Section 4(b) of the Natural Gas Act. 15 U.S.C. § 717c(b). Not only would this argument, if valid, in effect wipe out the courts' jurisdiction to make damage awards in breach of contract actions in situations such as here involved,[27] but it assumes that GW alone of all interruptible customers would be entitled to an award of damages. Although GW is the only customer who has brought suit, there is nothing blocking other interruptible customers similarly situated from also bringing suit against KN and recovering appropriate damages.

Nor does awarding GW damages for breach of contract under these facts violate the filed rate doctrine. GW does not question the rate charged for gas delivered to it. GW's complaint is that KN breached its contract by not delivering gas. GW's damages were, in fact, measured as the difference in cost between operating its factories with fuel oil and with natural gas, and its cost of operating with natural gas was measured as "the price [of] natural gas under the con-

---

controverted issues of fact; the party claiming error may appeal without the necessity of filing a motion for a new trial or a motion to alter or amend a judgment.

Not only did KN fail to make any argument under the filed rate doctrine in any post-trial motion directed to the trial court, but it also failed to raise an argument under that doctrine in its motion for summary judgment or in its response to GW's summary judgment motion.

[27]Indeed, when KN was a plaintiff in a breach of contract lawsuit, *i.e.*, its suit against Pan American, it sought and obtained damages. *See* 297 F.2d at 564-65.

tracts." Pet. App., p. 35a. In other words, GW's damages were premised upon the validity of the price for gas, *i.e.*, the filed rate, which KN charged GW. GW, in fact, accepted the filed rate without question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HARDIN HOLMES
KENNETH L. STARR
JEFFREY REIMAN
HOLMES & STARR
717 - 17th St., Ste. 2440
Denver, CO 80202
(303) 292-1500

MELVIN RICHTER
1050 17th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 331-1194
Counsel of Record

Attorneys for
The Great Western Sugar Company

May, 1985

APPENDIX

APPENDIX

In compliance with Rule 28.1, Counsel for Respondent, The Great Western Sugar Company, state that GW is now the debtor in possession in a Chapter 11 proceeding under the Bankruptcy Act instituted in March 1985. The following list includes all parent companies, subsidiaries, and affiliates of GW:

Planet Investment Corporation
  Keep Corporation
Hunt International Resources Corporation
  Great Western United Corporation
    Great Western Cities, Inc. of New Mexico
      Great Western Cities Realty
    California City Development Company
      Great Western Cities, Inc.
        California City Realty Company
        Borden Valley Water Development Company
        Western Cities Hotels, Inc.
      Great Western United Properties, Inc.
    Colorado City Development Company
      Colorado City Realty Company
      Great Western Cities Realty Company
  Boron Royalty Corporation
  GWS International Trading Company
  Hunt International Coal & Trading
  Crescent Home Export Company
  The Great Western Sugar Company
    Great Western Sugar Export Company
    Northern Ohio Sugar Company
    Godchaux-Henderson Sugar Co., Inc.
    The Great Western Railway Company
    Sierra White Sugar Company
    Bighorn Limestone Company
  Offshore Investment Limited

Pillar Drilling
Impel Energy Corporation
Western Energy Land Company
Western Energy Coal Company
Energy Equipment Corporation
Carver Tipple Corporation
Impel New Zealand, Ltd.
Oakdale Tipple Corporation
Shakey's Inc.
Shakey's International Ltd.
Shakey's National Advertising Fund, Inc.
Shakey's Pizza Parlor Company, Inc.
Shakey's of Texas, Inc.
Shakey's New York Pizza, Inc.
Sheridan Pizza Parlor, Inc.
Wyoming No. 1
Wyoming No. 2
Wyoming No. 3
Wyoming No. 4
Hunt Electronic Company
OSB, Inc.

MOTION FILED
JUN 4 19

(3)

No. 84-1746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KN ENERGY, INC.,
Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN H. CHEATHAM, III
Counsel of Record
EDWARD B. MYERS
1660 L Street, N.W.
Washington, D.C. 20036
(202) 293-5770

Attorneys for
Interstate Natural Gas Association of America

June 4, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

36 pp

1985

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

ASSOCIATE MEMBERS

Amoco Production Company
ARCO Oil and Gas Company
Atlanta Gas Light Company
The Brooklyn Union Gas Company
Champlin Petroleum Company
Chevron USA
Cities Service Oil and Gas Corporation
Conoco Inc.
Entex, Incorporated
Exxon Company, U.S.A.
Forest Oil Corporation
Gulf Oil Exploration and Production Co.
John H. Hill
HNG Fossil Fuels Company
HNG Oil Company
Kerr-McGee Corporation
Kinsey Interests, Inc.
Laclede Gas Company
Lear Petroleum Exploration Company
Marathon Oil Company
Minerals, Inc.
Mitchell Energy & Development Corp.
National Fuel Gas Company
NUI Corporation
Phillips Petroleum Company
Shell Oil Company
Southern California Gas Company
Sun Exploration & Production Company
Texaco U.S.A.
Union Oil Co. of California

1985

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

ACTIVE MEMBERSHIP

Alabama-Tennessee Natural Gas Company
Algonquin Gas Transmission Company
ANR Pipeline Company
Arkla, Inc.
Colorado Interstate Gas Company
The Columbia Gas System, Inc.
Consolidated Natural Gas Company
El Paso Natural Gas Company
Granite State Gas Transmission Inc.
Great Lakes Gas Transmission Company
Houston Natural Gas Company
Kentucky West Virginia Gas
KN Energy, Inc.
Locust Ridge Gas Company
Michigan Gas Storage Company
MidCon Corporation
Mid Louisiana Gas Company
Northern Natural Gas Company
Northwest Energy Company
Pacific Gas Transmission Company
Pacific Interstate Transmission Co.
Panhandle Eastern Corporation
Ringwood Gathering Company
Southern Natural Gas Company
Tennessee Gas Transmission Company
Texas Eastern Transmission Corp.
Texas Gas Transmission Corporation
Texas Oil & Gas Corporation
Transcontinental Gas Pipe Line Corporation
United Gas Pipe Line Company
Valero Interstate Transmission Co.
Valley Gas Transmission, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1746

KN ENERGY, INC.,

Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Interstate Natural Gas Association of America (INGAA)[1] hereby moves for leave to file the accompanying brief *amicus curiae*. This Motion is necessary because counsel for one party to this proceeding, the Great Western Sugar Company (Great Western), has refused to consent to the filing of such brief. Significantly, neither Great Western nor any other party objected to INGAA's motion for leave to intervene and file a brief *amicus curiae* in

[1] INGAA's member companies are listed on the inside cover and the cover's facing page of this motion and brief.

the proceedings below.[2] All other parties to this proceeding have consented to INGAA filing an *amicus* brief herein, as evidenced by the letters of consent filed with the Clerk in this docket.

INTEREST OF *AMICUS CURIAE*

INGAA is the nonprofit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States. These companies are subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission (Commission) under the Natural Gas Act of 1938 (15 U.S.C. Section 717, *et seq.*), the Department of Energy Organization Act (42 U.S.C. Section 7101, *et seq.*) and the Natural Gas Policy Act (15 U.S.C. Section 3301, *et seq.*).

The service obligations of INGAA's member companies, including KN, are specifically regulated by the Commission pursuant to Section 7 of the Natural Gas Act (15 U.S.C. Section 717(f)). The regulatory authority of the Commission in this regard is pervasive and provides the Commission with primary and exclusive jurisdiction over interruptions of service. Based on this exclusive and pervasive jurisdiction, the Colorado courts erred in not referring questions relating to interruptions of service to the Commission before reaching a decision on the question of compliance with state contract law. This error is of important legal significance because it is contrary to prior holdings of this Court and other courts. It is also of broad practical significance because it (a) undermines uniform regulation of the interstate transportation of natural gas mandated by Congress in the NGA, (b) brings into doubt the policies and programs of the Commission, which, during the supply shortages of the 1970's, were implemented on a broad basis

---

[2] See order of the Supreme Court of Colorado, dated September 20, 1982 [Appendix to this Motion].

by numerous interstate natural gas pipelines, and (c) puts such pipelines at risk in this and other pending proceedings for curtailments or service interruptions performed in accordance with Commission certificates, tariffs, orders, and regulations.[3]

For all of the above reasons, the interests of the interstate natural gas transmission industry in this proceeding are relevant to the disposition of the Petition for a Writ of Certiorari by this Court. These interests cannot adequately be represented by any party other than INGAA.

WHEREFORE, INGAA respectfully requests this Court to grant it leave to file a Brief *Amicus Curiae* in support of Petitioner.

Respectfully submitted,

JOHN H. CHEATHAM, III
Counsel of Record
EDWARD B. MYERS
1660 L Street, N.W.
Washington, D.C. 20036
(202) 293-5770

Attorneys for
Interstate Natural Gas
Association of America

June 4, 1985

---

[3] See *e.g.*, *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.*, C.A. No. J74-185(N) (S.D. Miss. April 22, 1977); *Mississippi Power Co.* v. *United Gas Pipe Line Co.*, C.A. No. S74-285(C) (S.D. Miss. June 14, 1977); *Allied Paper Co.* v. *United Gas Pipe Line Co.*, C.A. No. 75-431(H) (S.D. Ala. Jan. 19, 1977); *Texasgulf Inc.* v. *United Gas Pipe Line Co.*, 471 F.Supp. 594 (D.D.C. 1979); *Texasgulf Inc.* v. *United Gas Pipe Line Co.*, C.A. No. 2253-71 (D.D.C. Oct. 26, 1984).

APPENDIX TO MOTION

SUPREME COURT, STATE OF COLORADO

Case No. 82 SC 322

CERTIORARI TO THE COLORADO COURT OF APPEALS

ORDER OF COURT

KANSAS-NEBRASKA NATURAL GAS CO., INC., a Kansas corporation, *Petitioner,*

vs.

THE GREAT WESTERN SUGAR COMPANY, a Delaware corporation, *Respondent,*

and

NORTHERN NATURAL GAS CO., a Delaware corporation, *Defendant.*

Upon consideration of Motion for Special Admission as an Out of State Attorney filed by John H. Cheatham, III and the Motion of the Interstate Natural Gas Association of America for Leave to appear as Amicus Curiae in the above cause filed by John H. Cheatham, III herein, and now being sufficiently advised in the premises,

It Is This Day Ordered that said Motions shall be, and the same hereby are, Granted, and the Interstate Natural Gas Association of America shall be permitted to file a Brief as Amicus Curiae.

BY THE COURT, SEPTEMBER 20, 1982

cc: John H. Cheatham, III
Interstate Natural Gas
Association of America
1660 L Street, N.W.
Suite 601
Washington, D.C. 20036

Bruce D. Pringle
James A. Clark
BAKER & HOSTETLER
16th Ave. & Grant St., #500
Denver, CO 80203

William R. Smith
HERSHBERGER, PATTERSON, JONES
AND SMITH
100 South Main, Suite 600
Wichita, Kansas 67202

Charles J. Knight
The Great Western Sugar Co.
P.O. Box 5308
Denver, CO 80217

Hardin Holmes
Kenneth L. Starr
Jeffrey F. Reiman
HOLMES & STARR
717-17th St., Suite 2440
Denver, CO 80202

Charles Kreager
KREAGER & DOWIS
229 Foote Building
Box 350
Sterling, CO 80751

Melvin Richter
LITTMAN, RICHTER, WRIGHT
& TALISMAN, P.C.
1050-17th Street, N.W., Suite 600
Washington, D.C. 20036

[Supreme Court State of Colorado Certified to be a full, true and correct copy Sep 21 1982 David W. Brezina Court Seal By /s/ K. Eldredge Deputy Clerk]

TABLE OF CONTENTS

	Page
INTEREST OF *Amicus Curiae*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The Colorado Courts Erroneously Failed to Defer to the Commission's Primary and Exclusive Jurisdiction Over Interruptions in Service by Interstate Natural Gas Pipelines	4
A. The doctrines of primary and exclusive jurisdiction are well established	4
B. The Commission's broad jurisdiction over interruptions in service has been repeatedly sustained by the Courts	6
II. The Need To Effectuate The Objectives Of The Natural Gas Act In A Uniform And Equitable Manner Requires Reversal Of The Decisions Below	10
III. The Colorado Supreme Court's Interpretation Of KN's Tariff Filings Is In Error	15
CONCLUSION	16

TABLE OF AUTHORITIES

COURT CASES: Page

Allied Paper, Inc. v. *United Gas Pipe Line Co.*, C.A. No. 75-431(H) (S.D. Ala. Jan. 19, 1977) 9

Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981) 13

Atlanta Gas Light Co. v. *Federal Power Commission*, 476 F.2d 142 (5th Cir. 1973) 5

California v. *Southland Royalty Co.*, 436 U.S. 519 (1978) 6

Carter v. *American Telephone Co.*, 365 F.2d 486 (5th Cir. 1966) 16

C.F. Industries v. *Transcontinental Gas Pipeline Corp.*, 614 F.2d 33 (4th Cir. 1980) 10

Chicago & Northwestern Transportation Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) ..... *passim*

Federal Power Commission v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) ..... *passim*

Fidelity Federal Savings & Loan Assoc. v. *de la Cuesta*, 458 U.S. 141 (1982) 16

Great Western Sugar Co. v. *FERC*, No. 83-1135 (D.C. Cir., April 16, 1984) 11

Gulf Oil Corporation v. *Federal Power Commission*, 563 F.2d 588 (3rd Cir. 1977) 6, 10

International Paper Co. v. *Federal Power Commission*, 476 F.2d 121 (1973) 16

J. M. Huber Corp. v. *Denman*, 367 F.2d 104, 111-12 (5th Cir. 1966) 5

Marine Engineers Beneficial Assn. v. *Interlake S.S. Co.*, 370 U.S. 173 (1962) 12

Maryland v. *Louisiana*, 451 U.S. 725 (1981) 13

Mississippi Power Co. v. *United Gas Pipe Line Co.*, No. S74-285(C) (S.D. Miss. June 14, 1977) 9

TABLE OF AUTHORITIES continued

	Page
Mississippi Power & Light Co. v. *United Gas Pipe Line Co.*, No. J74-185(N) (S.D. Miss. April 22, 1977)	9
Mississippi Power & Light Co. v. *United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977)	*passim*
Missouri Pacific R. Co. v. *Stroud*, 267 U.S. 404 (1925)	13
Nader v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1978)	12
Pan American Petroleum Corp. v. *Superior Court*, 366 U.S. 656 (1961)	12
Panhandle Eastern Pipe Line Co. v. *Michigan Consolidated Gas Co.*, 177 F.2d 942 (6th Cir. 1949)	7
Panhandle Eastern Pipe Line Co. v. *Public Service Comm'n*, 332 U.S. 507 (1947)	6-7
Texasgulf, Inc. v. *United Gas Pipe Line Co.*, 471 F. Supp. 594 (D.D.C. 1979)	9, 10
Texasgulf, Inc. v. *United Gas Pipe Line Co.*, No. 2253-71 (D.D.C. Oct. 26, 1984)	9
Texas & Pacific Railway Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907)	4, 12
United Gas Pipeline Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956)	15

COMMISSION DECISIONS:

KN Energy, Inc., 21 FERC (CCH) ¶ 61,285 (1982)	8, 11
Order No. 431, 45 FPC 570 (1971)	*passim*
Transcontinental Gas Pipe Line Corporation, 13 FERC (CCH) ¶ 61,147 (1980)	10
United Gas Pipe Line Company, 4 FERC (CCH) ¶ 61,151 (1978)	9

TABLE OF AUTHORITIES continued

Page

United Gas Pipe Line Company, 20 FERC (CCH) ¶ 63,070 (1982) 9

U.S. CONSTITUTION:

Article 1, Clause 2 ("The Supremacy Clause") ...*passim*

STATUTES:

Natural Gas Act, 15 U.S.C. Section 717, *et seq.* 2

Section 4, 15 U.S.C. Section 717c 15

Section 7, 15 U.S.C. Section 717f(a)-(h) 5

MISCELLANEOUS:

4 Davis, *Administrative Law Treatise*, Section 22:1 (1983) 5

Travis, *Primary Jurisdiction: A General Theory and Its Application to the Securities Exchange Act*, 63 Calif. L. Rev. 926 (1975) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1746

KN ENERGY, INC.,

Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF *AMICUS CURIAE* OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This *amicus curiae* brief is respectfully submitted by the Interstate Natural Gas Association of America (INGAA) in support of the Petition for Writ of Certiorari of KN Energy, Inc. (KN).

INTEREST OF *AMICUS CURIAE*

INGAA is a nonprofit national trade association whose membership includes virtually all of the major interstate natural gas transmission companies subject to the jurisdiction and regulation of the Federal Energy Regulatory

Commission, the successor to the Federal Power Commission[1] under the provisions, *inter alia,* of the Natural Gas Act of 1938, as amended. 15 U.S.C. Sections 717 *et seq.* (1982). INGAA's member pipeline companies, one of whom is KN, account for approximately 90 percent of all natural gas transported and sold in interstate commerce.

INGAA was granted intervention *amicus curiae* in the Colorado Supreme Court and filed a memorandum in support of KN's Petition for a Writ of Certiorari with that Court. This case raises important questions of concern to the interstate natural gas transmission industry regarding 1) the Commission's primary and exclusive jurisdiction relative to an interstate pipeline's service interruptions implemented under Commission certificates of public convenience and necessity, Commission orders, and/or the pipeline's tariffs on file with the Commission, and 2) whether, under the Supremacy Clause of the Constitution, the pipeline could nonetheless be held liable for such service interruptions under state contract law.

The Colorado Supreme Court declined to review the jurisdictional questions, and went on to hold that Commission certificates, orders and tariffs had no effect on KN's contract liability for service interruptions. That Court's decision could negatively affect the entire interstate gas pipeline industry. At stake is the potential liability of interstate pipelines under state contract law for Commission-sanctioned service interruptions that were implemented during a time of widespread gas shortages in the interstate market.

The Colorado courts' failure to recognize or defer to the Commission's primary and exclusive jurisdiction on these matters is inconsistent with the pronouncements of this

---

[1] The term "Commission" when used in the context of action taken prior to October 1, 1977, refers to the Federal Power Commission; when used otherwise, the reference is to the Federal Energy Regulatory Commission.

Court in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). As a result, in its present form, this case is likely to lead to the types of inequities among states which this Court sought to prevent in *Louisiana Power & Light*. As the trade association representative of virtually all major interstate natural gas transmission systems that were subject to service interruptions and the Commission's curtailment program, INGAA is uniquely qualified to present the industry's position relative to this case and the adverse impact the Colorado Supreme Court's decision could have on the entire industry. Additionally, review by this Court is necessary to correct the Colorado courts' misapplication, or disregard, of unequivocal Supreme Court precedent.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari herein should be granted. If not vacated or reversed, the decisions of the Supreme Court of Colorado and lower state courts will stand as precedents undermining the primary and exclusive jurisdiction of the Commission over interruptions and curtailment of service by interstate natural gas pipelines. The state courts involved herein, before ruling on the contract claims before them, should have referred to the Commission a number of related questions involving pipeline compliance with the terms of service sanctioned by certificates, tariffs, orders, and rules of that Commission. Not to have so referred these questions to the Commission is contary to a number of decisions by this Court and other federal courts as well as the statutory scheme of the Natural Gas Act, and the pervasive regulation created by that Act. Moreover, it was also erroneous because the Supremacy Clause of the U.S. Constitution and the policies of the Natural Gas Act call for uniformity in the regulation of interstate gas pipelines. Without referral, these policies will be thwarted.

ARGUMENT

I. The Colorado Courts Erroneously Failed to Defer to the Commission's Primary and Exclusive Jurisdiction Over Interruptions in Service by Interstate Natural Gas Pipelines.

A. The doctrines of primary and exclusive jurisdiction are well established.

When an industry is comprehensively regulated, as is the interstate natural gas transmission industry, contractual disputes must be reviewed within the context of that regulation. By failing to invoke the Commission's exclusive jurisdiction and by refusing to refer to the Commission questions relative to KN's compliance with the Commission's certificates, orders and tariffs that resulted in the interruption of service, the Colorado Supreme Court erroneously treated the dispute as a simple breach of contract action, which it is not.

The concept of "primary jurisdiction" originated in a series of decisions of this Court beginning with *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). In that case, the Court held that, in litigation relating to rates regulated by the Interstate Commerce Commission (ICC), state and lower federal courts should not proceed without first giving the ICC an opportunity to address issues within its jurisdiction.[2] The doctrine does not withdraw a court's power to decide a case, but rather provides the appropriate regulatory agency an opportunity to initially determine legal or factual issues that are peculiarly within its competence. *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.*, 532 F.2d 412, 417 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977). There the court succinctly described the primary jurisdiction doctrine as a

---

[2] See Travis, *Primary Jurisdiction: A General Theory and Its Application to the Securities Exchange Act*, 63 Calif. L. Rev. 926 (1975), especially at 927-933.

means of reconciling the regulatory function of administrative agencies with the judicial functions of courts.

In some cases, a regulatory agency also has "exclusive jurisdiction" over an issue. While founded on principles of expert administrative competence, as primary jurisdiction, the doctrine of exclusive jurisdiction is considered to *require* a referral to the agency before the courts permit litigation to go forward. As stated by Professor Davis:

> An agency often has exclusive jurisdiction, which is something more than primary jurisdiction. Agencies typically have exclusive jurisdiction to resolve issues of fact, subject to limited review. The Supreme Court has spoken of "a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined." *Far East Conference* v. *United States,* 342 U.S. 570, 574 (1952).[3]

The instant case is one where referral would not only be helpful to the Colorado Supreme Court, it is required. An interstate pipeline cannot engage in the interstate transportation of gas until it has obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act. When a certificate is accepted by the pipeline, the Commission acquires continuing jurisdiction over the services rendered and the operation of the facilities,[4] and the pipeline becomes bound

---

[3] See 4 Davis, *Administrative Law Treatise,* Section 22:1 (1983). See also *FPC* v. *Louisiana Power and Light,* 406 U.S. at 647 and *J. M. Huber Corp.* v. *Denman,* 367 F.2d 104, 111-12 (5th Cir. 1966).

[4] See *Federal Power Commission* v. *Louisiana Power & Light Co.,* 406 U.S. at 645-646 (1972). See also *Atlanta Gas Light Co.* v. *Federal Power Commission,* 476 F.2d 142, 151 (5th Cir. 1973).

by any conditions attached to the certificate and by its own representations as to how it planned to provide the services authorized. The performance of services under a certificate creates a federal obligation independent of any private contract.[5] It is, therefore, the certificate which controls the terms of service, and the interpretation and enforcement of the pipeline's public service obligations under its certificate are therefore within the Commission's primary and exclusive jurisdiction.[6] Accordingly, the Colorado Supreme Court erred in not referring these matters to the Commission before ruling on the question of breach of contract. Such referral would not deprive the Colorado Supreme Court of its jurisdiction over the breach of contract action. It would simply assure that the Commission's determination as to the pipeline's service obligation was applied by the state court in resolving the claimed breach of contract.

B. The Commission's broad jurisdiction over interruptions in service has been repeatedly sustained by the Courts.

Respondent Great Western urges denial of KN's petition on the ground that it involves interruption rather than curtailment of gas service. (Great Western Brief in Opposition, pp. 11-13). This is a distinction without a legal difference. This Court held in *Panhandle Eastern Pipe Line*

---

[5] See *California* v. *Southland Royalty Co.*, 436 U.S. 519 (1978) (service obligations resulting from certificates issued under the Natural Gas Act are not controlled by the terms of private contract).

[6] See Appendix hereto which contains pages 3-6 from the Brief *Amicus Curiae* of the Federal Energy Regulatory Commission filed with the Colorado Court of Appeals, June 26, 1980. See also *Gulf Oil Corporation* v. *Federal Power Commission*, 563 F.2d 588, 596-597 (3rd Cir. 1977), which related to the nature of Gulf's obligation to make deliveries of gas authorized by a certificate of public convenience and necessity previously issued by the FPC. There the court stated, ". . . this issue in the instant case is the interpretation of Gulf's public service obligation under its certificate, the interpretation of which can only be within the FPC's exclusive jurisdiction and which is not subject to arbitration. . . ."

Co. v. *Public Service Comm'n*, 332 U.S. 507, 516 (1947) that Congress drew "the transportation of natural gas in interstate commerce" within its regulatory power in enacting the Natural Gas Act. As to concerns about conflicting state and federal regulation "in relation to curtailment of service when weather conditions or others require it,"[7] the Court observed that "the matter of interrupting service is one largely related . . . to transportation and thus within the jurisdiction of the Federal Power Commision to control, in accommodation of any conflicting interests among the states." (332 U.S. at 523).

Most interstate pipelines provide interruptible service. Such service may be interrupted for any one of several reasons, including a lack of pipeline capacity, the need to maintain pipline pressure, anticipated or actual weather changes, the need to husband gas in storage, a lack of gas supply in the field and the need to protect high priority customers from interruption. Commission jurisdiction does not depend upon the reason for interruption, nor is it activated by calling it a curtailment rather than an interruption. Jurisdiction depends upon the fact that transportation of natural gas in interstate commerce is interrupted. *Federal Power Commission* v. *Louisiana Power & Light Co., supra.* That jurisdiction is exercised by the Commission because the "adequacy and impartiality of service in the light of existing circumstances are within Commission control." *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942, 945 (6th Cir. 1949).

In *Federal Power Commission* v. *Louisiana Power & Light Co., supra,* this Court held that the Commission's jurisdiction over the transportation of natural gas in interstate commerce embraced regulation of a pipeline's system-wide interruptions in service to the exclusion of state regu-

---

[7] "Curtailment" as here used by the Court refers to weather-related interruptions which KN imposed on its system.

lation. This Court went on to hold that the courts lacked jurisdiction to compel specific performance of a direct sale customer's contract by enjoining a pipeline's curtailments. This Court also held that the FPC had properly exercised its jurisdiction over curtailments through use of Order No. 431 (45 FPC 570 (1971)), and the procedures afforded by Section 4 of the Natural Gas Act.

Finally, this Court held that the Court of Appeals had erred in deciding whether a portion of the pipeline's system was subject to the FPC's jurisdiction. 406 U.S. at 647. The Court observed that the FPC was in the process of deciding this very issue, and that under the circumstances "the District Court and the Court of Appeals *were obliged to defer to the FPC for the initial determination of its jurisdiction.*" *Id.* (Emphasis supplied).[8]

Furthermore, in *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co., supra,* the U.S. Court of Appeals for the Fifth Circuit applied the *Louisiana Power & Light* decision by holding that the Commission had primary jurisdiction over a pipeline's potential contract liability for damages arising under the Commission's curtailment program. The Court of Appeals held that the Natural Gas Act had "provided the Commission with the statutory basis for pervasive regulation of the curtailment question" and that referral to the Commission for exericse of its primary jurisdiction was "particularly appropriate", if not mandatory, with respect to some issues. (532 F.2d at 419). In particular, the Fifth Circuit noted that the Commission's "informed opinion" on whether the pipeline's tariff pro-

---

[8] At the time of the Colorado Supreme Court's decision, the Commission had instituted a proceeding into the effect, if any, of its orders and/or KN's certificates and tariffs upon KN's alleged contract liability to Great Western for interruptions in service. That proceeding is currently pending at the Commission. *KN Energy, Inc.*, 21 FERC (CCH) ¶61,285 (Dec. 7, 1982).

vided it with any defense to the damage claims would be critical to resolution of those claims:

> Certainly the interpretation and implementation of a tariff is a question properly passed upon in the first instance by the Commission, and reference by a court to a regulatory agency may not even be discretionary on such an issue. *Interstate Commerce Commission* v. *Atlantic C.L.R. Co.*, 383 U.S. 576, 600-601, 86 S.Ct. 1000, 1014-1015, 16 L.Ed.2d 109, 126 (1966); *United States* v. *Western P.R. Co.*, 352 U.S. 59. . . .

532 F2d at 420.

Subsequent to the *Mississippi Power & Light* decision, a number of federal courts in which breach of contract suits for curtailments had been brought referred issues to the Commission for exercise of its jurisdiction and stayed trial in the interim.[9] The Commission accepted some of the referred issues, incorporated them into an ongoing proceeding dealing with the pipeline's potential contract liability for curtailments, and is currently reviewing an administrative law judge's initial decision in that case.[10]

In the only curtailment damage suit in which a federal court refused to refer issues to the Commission for exercise of its primary jurisdiction, the Court of Appeals itself

---

[9] *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.*, No. J74-185(N) (S.D. Miss. April 22, 1977); *Mississippi Power Co.* v. *United Gas Pipe Line Co.*, No. S74-285(C) (S.D. Miss. June 14, 1977); *Allied Paper Inc.* v. *United Gas Pipe Line Co.*, No. 75-431(H) (S.D. Ala. Jan. 19, 1977); *Texasgulf Inc.* v. *United Gas Pipe Line Co.*, 471 F.Supp. 594 (D.D.C. 1979). One of the district courts vacated the stay after it had been in effect for several years and proceeded to trial. *Texasgulf Inc.* v. *United Gas Pipe Line Co.*, No. 2253-71 (D.D.C. Oct. 26, 1984). That case has not yet been decided.

[10] The referral issues accepted by the Commission are reported at 4 FERC (CCH) ¶61,151 (1978). The administrative law judge's initial decision is reported at 20 FERC (CCH) ¶63,070 (1982).

referred issues and stayed the appeal of a damage judgment against the pipeline during the interim.[11] The U.S. Court of appeals for the Fourth Circuit there stated "that deference to the primary jurisdiction of the Commission is particularly appropriate in the complex area of natural gas curtailment."[12]

II. The Need To Effectuate The Objectives Of The Natural Gas Act In A Uniform And Equitable Manner Require Reversal Of The Decisions Below.

The federal courts that have considered the Commission's jurisdiction over curtailment-related damage claims have concluded that the needs to assure uniform regulatory treatment of pipelines and to avoid unwarranted state interference in carrying out the Natural Gas Act's mandate overwhelmingly support the Commission's primary and exclusive jurisdiction.[13] Those needs are present in this case as

---

[11] *C.F. Industries* v. *Transcontinental Gas Pipeline Corp.*, 614 F.2d 33 (4th Cir. 1980).

[12] 614 F.2d at 35. The Court of Appeals asked the Commission to determine the meaning and interpretation of the pipeline's gas tariff provisions and service agreements and of the Commission's orders, rules and regulations relating to curtailments upon the pipeline's alleged contract liability for curtailments. The Commission accepted some of these and other referred issues, and incorporated them into an ongoing proceeding. 13 FERC (CCH) ¶ 61,147 (Nov. 19, 1980). The Commission is now reviewing an administrative law judge's initial decision in the case.

[13] *C. F. Industries, Inc.* v. *Transcontinental Gas Pipeline Corp., supra; Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976); *Texasgulf, Inc.* v. *United Gas Pipe Line Co., supra.* Cf. *Chicago and N. W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) wherein this Court, in speaking of the authority of the ICC, observed that:

> The exclusive and plenary nature of the Commission's authority to rule on carriers' decisions to abandon lines *is critical to the congressional scheme which contemplates comprehensive administrative regulation of interstate commerce.* 450 U.S. at 321 (Emphasis supplied). See also, *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588 (3rd Cir. 1977) and *FERC* v. *Shell Oil Co.*, 566 F.2d 536 (5th Cir. 1978), *aff'd*, 440 U.S. 192 (1979).

well. Only by permitting the Commission to exercise its jurisdiction before the state courts render judgment can there be harmony in this case between the state and federal interests and between the respective jurisdictions of the courts and the Commission. Moreover, the failure to refer these questions of certificates and tariffs to the Commission could place pipelines in the untenable position that their compliance with federal service obligations could subject them simultaneously to liability under state law for breach of contract.

The grant of a writ of certiorari would permit this Court to review the Colorado Court of Appeals' conclusion, which the Supreme Court of Colorado declined to review, that, notwithstanding the foregoing, the doctrines of primary and exclusive jurisdiction are inapplicable to this case. The conclusion was premised upon the Court of Appeals' reasoning that:

> [t]he issues presented here involve common law contract claims. The fact that the Natural Gas Act and applicable tariffs affect some of the dealings between the parties *does not oust state courts* of jurisdiction over these common law claims. . . .[14] (Emphasis added).

There are two deficiencies in this reasoning. First, while the plaintiff has *asserted* "common law contract claims," the issues involve, *inter alia,* the effect on these claims of Commission orders, rules, and regulations and KN's tariff.[15]

---

[14] Slip opinion, page 9.

[15] The existence of a federal interest in this proceeding is evidenced by (a) the Commission's repeated requests to the Colorado courts to refer issues for exercise of its primary and exclusive jurisdiction, (b) the Commission's institution of a special proceeding to determine how its orders and KN's certificates and tariffs affect KN's alleged contract liability to Great Western, and (c) the denial by the Commission of Great Western's motion to dismiss KN's motion for a declaratory order. See *KN Energy, Inc.*, 21 FERC (CCH) ¶ 61,285 (Dec. 7, 1982), petition for review dismissed, *Great Western Sugar Co.* v. *FERC*, No. 83-1135 (D.C. Cir., April 16, 1984).

Second, KN has not contended that the presence of these orders and tariff provisions "oust" the state courts of jurisdiction over the common law claims.[16] Rather, the contention is that, in a case involving the interpretation and effect of Commission orders and a pipeline's tariffs upon the common law claims, where the Commission asserts the right to make these interpretations initially in order to ensure the uniformity and integrity of its regulation, the doctrines of primary and exclusive jurisdiction require a referral of issues to the Commission.[17] The appropriateness of referral is demonstated further, by the proceeding underway at the Commission prior to the time of the Colorado Supreme Court's decision, which proceeding is still pending.[18]

In declining to refer, the Colorado Court of Appeals placed reliance on *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1978). However, in *Nader,* this Court distinguished the *Abilene* case, *supra.* Unlike *Abilene,* in *Nader* there was no irreconcilable conflict between the statutory scheme and the persistence of common law remedies. The *Nader* Court said that "[i]n *Abilene* the carrier, if subject to both agency and court sanctions, would be put in an untenable position when the agency and a court disagreed on the reasonableness of a rate. . . ." (*Id.* at 299). If the Colorado Court of Appeals' decision, affirmed by the Supreme Court of Colorado, is allowed to stand, KN would find itself in a comparably untenable position.

---

[16] See Kansas-Nebraska's Petition for Rehearing, p. 8. Consequently, the case principally relied upon by the Court of Appeals for its failure to apply the primary jurisdiction doctrine, *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961), is inapposite. That case involved removal jurisdiction, *i.e.,* whether the case arose under federal law and hence lay within the exclusive jurisdiction of the federal courts.

[17] The doctrine does not ask courts to give the agency the last word—only the first. *Marine Engineers Beneficial Ass'n* v. *Interlake S.S. Co.*, 370 U.S. 173, 185 (1962).

[18] See Note 8, *supra.*

Additionally, in such circumstances, serious constitutional issues would be raised under the Supremacy Clause of the United States Constitution. In *Arkansas Louisiana Gas Co.* v. *Hall,* 453 U.S. 571 (1981), this Court held that a state court's award of damages for breach of contract was inconsistent with the pipeline's filed tariff prescribing the rate and that the damage award could not stand under the Supremacy Clause. In *Chicago & Northwestern Transportation Co.* v. *Kalo Brick & Tile Co., supra,* this Court held that a state court's award of damages for a rail carrier's failure to furnish freight cars on a branch line likewise had to be set aside because it was preempted under federal law. The Court, quoting *Missouri Pacific R. Co.* v. *Stroud,* 267 U.S. 404, 408 (1925), observed that "[t]here can be no divided authority over interstate commerce and the acts of Congress on that subject are supreme and exclusive," 450 U.S. at 319. This Court also commented that "A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act. . . ." *Id.* at 326.[19] In the area of natural gas curtailments, this Court has observed, "the desirability of uniform federal regulation is abundantly clear." *FPC* v. *Louisiana Power & Light Co.,* 406 U.S. at 635. Indeed, such uniformity serves both federal and state interests, since it eliminates the possibility of discrimination in favor of a pipeline's customers in one state against customers in another state when curtailments are necessitated.

While paying lip service to the Commission's right to approve curtailment plans which may supersede private contractual provisions,[20] the Colorado courts usurped that

---

[19] For another recent natural gas case in which the Supremacy Clause was invoked to overrule state action, see the majority opinion (by Justice White) in *Maryland* v. *Louisiana,* 451 U.S. 725, 753-60 (1981).

[20] See Appendix A to KN's Petition, p. 19a.

very power. As in *Kalo Brick & Tile, supra,* "[t]he decision below amounts to a holding that a State can impose sanctions upon a regulated carrier for doing that which only the Commission, acting pursuant to the will of Congress, has the power to declare unlawful or unreasonable." 450 U.S. at 324.

This is so because the Colorado decision has the effect of holding Great Western exempt from the federal orders, certificates or tariffs that apply to the type of interruptions in service complained of by Great Western.

This Court recognized in *Louisiana Power & Light* that exemptions from curtailment programs could produce a seriously inequitable system of gas distribution vis-à-vis customers such as schools, hospitals and homes. 406 U.S. at 632. The record in this case reveals no consideration of the impact upon such customers caused by exempting Great Western. The Colorado courts have thus ignored this Court's admonition that there should "be no 'gaps' for private interests to subvert the public welfare." *Id.* at 631.[21] In short, it is important for the Court to review this case both to protect the Commission's exclusive jurisdiction over curtailment programs and also to ensure that conflicting state court decisions do not "produce a seriously inequitable system of gas distribution" between the states. *Louisiana Power & Light,* 406 U.S. at 632.

---

[21] In its *Amicus* brief filed in the Colorado trial court, the Commission indicated that it would consider these important public policies. For instance, it stated that:

> [d]eferral to the Commission is particularly appropriate in this case, because the issues which this damage action invokes are highly complex and have an impact on the public interest which transcends the private litigation before this Court. There is a substantial possibility, absent reference to the Commission, of a conflict between the decisions of this Court and the Commission. Such conflict could affect the Commission's ability to regulate reductions in natural gas service in a uniform manner.

KN's petition, p. 9, n.11.

III. The Colorado Supreme Court's Interpretation Of KN's Tariff Filings Is In Error.

The need for referral of this proceeding to the FERC is further demonstrated by the holding of the Colorado Supreme Court that, even if KN's tariffs (a) were filed in response to Commission Order No. 431 and subsequent Commission orders pertaining to curtailments and (b) were placed into effect pursuant to Section 4 of the Natural Gas Act, such tariff filings were unilateral actions under *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and as such, could only affect KN's contract liability upon a Commission finding that the tariff filings were just and reasonable.[22] These holdings of the Colorado Supreme Court overlook *Louisiana Power & Light, supra,* wherein this Court held that a pipeline's tariff filings in response to Commission curtailment orders were *not* unilateral actions and hence were expressly distinguishable from the situation in *Mobile:*

> *Amici* have argued that permitting the pipeline's tariff amendments to take effect despite contrary terms in existing contracts is inconsistent with any decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). In that case, however, we dealt with an attempt by a pipeline *unilaterally* to effect a change in its contract terms by making a filing under Section 4. In the present cause, the issue is whether FPC, acting under the head of its transportation jurisdiction and its broad mandate under Section 16, may order pipelines facing shortages to develop and submit rational curtailment arrangements. Our holding in *Mobile Gas Service Corp.* does not govern the decision of this issue. . . .

406 U.S. at 646. This Court went on to state that under Order No. 431, one of the orders relied upon by KN "[a]ll pipelines facing shortages necessitating curtailment are *required* to file reasonable allocation schemes as amendments

---

[22] Appendix A to KN's petition, pp. 22-24.

to their existing tariffs, or to state that the existing tariffs are adequate." 406 U.S. at 645 (Emphasis added). In light of the foregoing, it is manifestly clear that the FPC's orders and KN tariffs, if they authorize the interruptions to Great Western complained of, govern any inconsistent obligations because of the supremacy of federal laws.[23] As has been noted, strong judicial precedent calls upon the courts below to defer to the FERC for initial determinations as to the precise meaning and application to this case of the orders and tariffs in question. Accordingly, the Colorado courts erred in not referring the matter to the FERC.

CONCLUSION

The grant of a writ of certiorari is warranted so that this Court can review the actions of the Colorado Supreme Court and the lower courts thereunder (a) in refusing to refer to the FERC issues pertaining to the construction and application of pertinent Commission orders, rules, regulations and tariff provisions and (b) in proceeding to construe these orders, rules, and tariff provisions as having no effect upon KN's alleged contract liability.

---

[23] See *Fidelity Federal Savings & Loan Assoc.* v. *de la Cuesta*, 458 U.S. 141 (1982); *Carter* v. *American Telephone Co.*, 365 F.2d 486 (5th Cir. 1966); *International Paper Co.* v. *FPC*, 476 F.2d 121, 131 (concurring opinion). See also *Chicago & Northwestern Transportation Co.* v. *Kalo Brick & Tile Co.*, *supra*.

Respectfully submitted,

JOHN H. CHEATHAM, III
Counsel of Record
EDWARD B. MYERS
1660 L Street, N.W.
Washington, D.C. 20036
(202) 293-5770

Attorneys for
Interstate Natural Gas
Association of America

June 4, 1985

APPENDIX

APPENDIX

Before a natural gas company may engage in the transportation of gas subject to the Commission's jurisdiction, or build or extend any facilities therefor, the company must obtain a certificate of public convenience and necessity, issued by the Commission under Section 7(c) of the Act, authorizing such acts or operations.[3]

When a certificate is issued by the Commission and accepted by the company, the Commission acquires a continuing jurisdiction over the services rendered thereunder and the operation of the certificated facilities.[4] The company may not thereafter abandon all or any portion of these facilities or any service rendered by these facilities,

---

[3] Section 7(c) provides in pertinent part:

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [15 U.S.C. § 717f(c)]

[4] Hence, courts do not have jurisdiction to order specific performance of a contractual obligation to deliver natural gas, where such delivery is under FERC's jurisdiction. *Atlanta Gas Light Co.* v. *FPC*, 476 F.2d 142, 151 (5th Cir. 1973).

without the Commission's permission obtained upon requisite findings.[5]

A pipeline company applying to the Commission for a Section 7(c) certificate to serve a customer submits a contract, entered into by the company and the intended customer, setting forth the terms and charges for the proposed service. The contract alone cannot start gas flowing to the customer, however. It requires a certificate to authorize commencement of the proposed service.

Section 7(e) of the Act requires that any proposed service, sale, operation, construction, extension or acquisition must be required by the present or future public convenience and necessity. To this end, Section 7(e) gives the Commission the power to attach to the certificate such reasonable terms and conditions as the public convenience and necessity may require.[6]

---

[5] Section 7(b) provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [15 U.S.C. § 717f(b)]

[6] Section 7(e) provides:

> Except in the cases governed by the provisions contained in subsection (e)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the

In accepting a certificate, the pipeline company becomes bound by any conditions and interpretations which the Commission has attached thereto. *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 156 (1959); *Atlantic Refining Co.* v. *Public Service Comm'n of New York*, 360 U.S. 378, 389 (1959). The service which a natural gas company performs under a certificate is distinct from the contract which regulates the company's relationship with its customer. *Sunray Oil Co., supra*, 364 U.S. at 137, 152-53. A certificate creates a federal obligation to provide the relevant service until the Commission permits its cessation. Under the statute the obligation to continue service attaches to the gas, not as a matter of contract but as a matter of law, and binds all those with dominion over the gas. *California* v. *Southland Royalty Co.*, 436 U.S. 519, 526 (1978). It is therefore the certificate, not the contract, which controls the terms of the service, and the interpretation and enforcement of the company's public service obligation under its certificate is within the Commission's exclusive jurisdiction.[7] 436 U.S. 519, 526-27; *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588, 596-97 (3rd Cir. 1977).

Were the Commission to find that a natural gas company had violated the terms of its certificate by failing to deliver the amount of gas to which a customer was en-

---

[6] [Footnote continued from previous page]

present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [15 U.S.C. § 717f (e)]

[7] The Commission has not already acted by defining the key contract term—the word "interruptible"—involved in this lawsuit. Indeed, its exact definition is a major subject of the proceedings in Docket No. RP76-90 (Phase II).

titled, the Commission has the power to require two types of remedy. It could order the company to pay a monetary refund, generally in the amount of the incremental cost that the customer incurred for alternate fuel supplies. *Mesa Petroleum Co.* v. *FPC,* 441 F.2d 182, 186-89 (5th Cir. 1971); *Gulf Oil Corp.* v. *FPC, supra,* 563 F.2d 588, 605-08. Or it could direct the company to pay back the customer with gas. *Cox* v. *FERC,* 581 F.2d 449 (5th Cir. 1978).

The certificated services to a pipeline's customers, direct sale or resale, are implemented by the pipeline's tariff. Every interstate pipeline files with the Commission a tariff containing the rates it charges its wholesale customers and the general terms and conditions of the service it provides to all its customers. The interpretation and implementation of tariff terms are within the Commission's primary jurisdiction. *United States* v. *Western Pacific R. Co.,* 352 U.S. 59, 63 (1956); *Mississippi Power & Light Company* v. *United Gas Pipe Line Company,* 532 F.2d 412, 420 (1976).

Office - Supreme Court, U.S.
FILED
JUN 7 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

K N ENERGY, INC.,
Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,
Respondent.

REPLY BRIEF OF K N ENERGY, INC.

ROBERT C. McHUGH, Esq.
K N Energy, Inc.
P.O. Box 15265
Lakewood, Colorado 80215

B. J. BECKER, Esq.
K N Energy, Inc.
P.O. Box 608
Hastings, Nebraska 68901

JOHN P. FURMAN, Esq.
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

JOHN T. MILLER, JR., Esq.
1001 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 331-1630

Attorneys for K N Energy, Inc. *Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

18pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. COMMISSION JURISDICTION OVER TRANSPORTATION DOES NOT OUST STATE COURTS OF JURISDICTION OVER BREACH OF CONTRACT SUITS; IT SIMPLY LIMITS THE ACTIVITIES OF A NATURAL GAS PIPELINE WHICH CAN BE FOUND TO BE IN BREACH OF CONTRACT IN SUCH SUITS 3

II. AN AWARD OF DAMAGES TO GREAT WESTERN WOULD BE CONTRARY TO SECTION 4 OF THE NATURAL GAS ACT 8

CONCLUSION 10

APPENDIX A 1a

TABLE OF AUTHORITIES

CASES:	Page
Arkansas Louisiana Gas Company v. *Hall*, 449 U.S. 814 (1980)	7
Arkansas Louisiana Gas Company v. *Hall*, 453 U.S. 571 (1981)	8
California v. *Southland Royalty Co.*, 436 U.S. 519 (1978)	6
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976)	4
Federal Power Commission v. *Louisiana Power & Light Company*, 406 U.S. 621 (1972)	2, 3, 9
Great Northern Railway Company v. *Merchants Elevator Company*, 259 U.S. 285 (1922)	5
Gulf Oil Corp. v. *Federal Power Commission*, 563 F.2d 588 (3d Cir. 1977)	6
Nader v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976)	4
Pan American Petroleum Corp. v. *Kansas-Nebraska Natural Gas Co., Inc.*, 297 F.2d 561 (8th Cir. 1962), *cert. denied*, 370 U.S. 937 (1962)	5
Pan American Petroleum Corp. v. *Superior Court*, 366 U.S. 656 (1961)	5
Panhandle Eastern Pipe Line Co. v. *Michigan Consolidated Gas Co.*, 177 F.2d 942 (6th Cir. 1949)	9
Panhandle Eastern Pipe Line Co. v. *Public Service Comm'n of Indiana*, 332 U.S. 507 (1947)	3
Regents of University of Georgia v. *Carroll*, 338 U.S. 586 (1950)	4
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956)	6
United States v. *Western Pacific Railroad Co.*, 352 U.S. 59 (1956)	5

TABLE OF AUTHORITIES continued

Page

W. R. Grace and Co. v. *Local Union 759*, 461 U.S. 757 (1983) 4

COMMISSION DECISIONS:

Kansas-Nebraska Natural Gas Company, Inc., 59 FPC 851 (1977) 6

Kansas-Nebraska Natural Gas Company, Inc., 1 FERC ¶ 61,110 (1977) 7

COMMISSION ORDERS:

Order Nos. 467 *et al.*, 49 FPC 85, 217, 583 (1973) 6

STATUTES:

Administrative Procedure Act, 5 U.S.C. § 557(b) 7

Natural Gas Act, 15 U.S.C. §§ 717 *et seq*:

Section 1(b) 2

Section 4 ..... 2, 8

Section 4(d) 8

Section 4(e) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1746

K N ENERGY, INC.,
Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,
Respondent.

REPLY BRIEF OF K N ENERGY, INC.

Respondent, The Great Western Sugar Company ("Great Western") has filed a Brief in Opposition to the petition of K N Energy, Inc. ("K N"). The Independent Natural Gas Association of America ("INGAA") has filed a Motion for leave to file a brief *amicus curiae* in support of K N's petition.[1]

Great Western did not address squarely the two questions presented by K N's petition. Instead, it framed

---

[1] Before the Supreme Court of Colorado INGAA filed a motion for leave to participate, which was granted, and a memorandum in support of K N's petition for a writ of certiorari.

three questions of its own in a manner which distorts and obscures the issues which K N seeks to present to this Court.

K N's first question deals with whether the Colorado courts have erred in refusing to refer specified issues to the Federal Energy Regulatory Commission ("Commission" or "FERC") before attempting to dispose of the common law breach of contract claims asserted by Great Western. K N has not asked this Court to determine "[w]hether the Federal Energy Regulatory Commission . . . has exclusive jurisdiction, *such as to oust a state court of jurisdiction,* to adjudicate a suit for breach of contract . . ." (Great Western Br. in Opp. p. i; emphasis supplied.)

K N's second question relates to interruptions in service at *only one* of Great Western's four plants, a plant which is served indirectly by K N through a sale-for-resale customer purchasing gas from K N under a tariff on file with the FERC. The question is whether an award of damages to Great Western in this particular situation would constitute a violation of Section 4 of the Natural Gas Act by leaving K N with a lower rate than provided for in its filed tariff. Great Western totally obscures the issue by treating it as if it applied to K N's sales to the three directly served plants.[2] The Commission has no jurisdiction over the rates charged by K N to direct sales customers. Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), "withheld from FPC only *rate-setting* authority with respect to direct sales." *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 638 (1972).

---

[2] See Br. in Opp. p. 23.

I

COMMISSION JURISDICTION OVER TRANSPORTATION DOES NOT OUST STATE COURTS OF JURISDICTION OVER BREACH OF CONTRACT SUITS; IT SIMPLY LIMITS THE ACTIVITIES OF A NATURAL GAS PIPELINE WHICH CAN BE FOUND TO BE IN BREACH OF CONTRACT IN SUCH SUITS.

Commission jurisdiction over interstate transportation of natural gas does not depend upon whether transportation is interrupted or the causes of interruption when it occurs, as Great Western suggests. (Br. in Opp. pp. 11-13) Congress drew "the transportation of natural gas in interstate commerce" within the regulatory power it delegated to the Commission in enacting the Natural Gas Act. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U.S. 507, 516 (1947). The "matter of interrupting service is one largely related . . . to transportation and thus within the jurisdiction" of the Commission. (332 U.S. at 523)

In *Panhandle* this Court referred to weather-related interruptions as curtailments,[3] terminology which K N historically used in describing interruptions. In *FPC* v. *Louisiana Power & Light Co.,* 406 U.S. 621 (1972), this Court was concerned with interruptions attributed to a gas supply shortage, but the finding of Commission jurisdiction was based on the fact that transportation in interstate commerce was involved.

Exclusive Commission jurisdiction over the transportation of natural gas by K N does not oust the Colorado courts of jurisdiction over Great Western's breach of contract suit. It merely limits the activities of K N which may be found to be in breach of contract.

---

[3] 332 U.S. at 523.

The K N/Great Western contracts contain a clause making them "subject to all valid and applicable laws and orders, rules and regulations of duly constituted authorities having jurisdiction or control over" K N's facilities and gas supply or any transportation contemplated under the contracts.[4] Activities in compliance with certificate orders of the Commission, and those in accord with Commission orders, rules and regulations, policy statements and K N's tariff, cannot be in breach of those contracts. Preemption of state law under the Supremacy Clause avoids placing the pipeline in the untenable position where it is liable for breach of contract for compliance with its obligations under federal law. It is quite relevant in this respect to observe that the judgments of the Colorado courts were not based on a finding that K N was negligent, imprudent, improvident or in breach of its obligations under the Natural Gas Act.

None of the cases cited by Great Western involved the issue of exclusive Commission jurisdiction.[5] Indeed none supports conclusions different from those stated

---

[4] See K N's Pet. for Writ, p. 5.

[5] At pages 14-15 of its Brief, Great Western cites a number of cases for the proposition that "a regulated company cannot abrogate its common law and other obligations merely by complying with a regulatory directive where compliance is not required or where the company could have avoided the directive's issuance or effect." W. R. Grace and Co. v. Local Union 759, 461 U.S. 757 (1983); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Regents of University System of Georgia v. Carroll, 338 U.S. 586 (1950); Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976). None of these cases involved regulatory areas in which Congress had conferred on a Federal agency the kind of exclusive jurisdiction which the FERC has been held to have over the transportation of gas in interstate commerce.

above. The sole question in *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961), was whether the state court had jurisdiction over the subject matter of a suit between a pipeline company and natural gas producers in the Hugoton Field in Kansas for overpayments made to the producers as a result of the imposition of a minimum price order of the Kansas Corporation Commission later found by this Court to be unconstitutional. This Court did not address the impact on the contract of federal regulation under the Natural Gas Act. The Court stated:

> We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi contract, not the ultimate validity of its arguments, is decisive.[6]

Great Western asserts (Br. in Opp. p. 13) that "The power to issue a directive has never carried with it, without more, the exclusive power to interpret it," citing *Great Northern Railway Company* v. *Merchants Elevator Company,* 259 U.S. 285 (1922), and *United States* v. *Western Pacific Railroad Co.,* 352 U.S. 59 (1956). But in the *Great Northern* case the need was only to determine the meaning of words in a railroad tariff which were used in an ordinary sense, and the Court concluded that "a construction given by any court, whether it be Federal or state, may ultimately be reviewed by this court, either on writ of error or on writ of certiorari; and thereby uniformity in construc-

---

[6] 366 U.S. at 664. Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., Inc., 297 F.2d 561 (8th Cir. 1962), *cert. denied,* 370 U.S. 937 (1962), involved a similar suit. (See Br. in Opp. n. 14)

tion can be secured." 259 U.S. at 290-1. In *Western Pacific* the question of tariff construction was held to be within the exclusive primary jurisdiction of the ICC.

Arrangements between a pipeline and a direct customer may be established initially by contract,[7] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 339 (1956), but the obligations of the pipeline under the certificate of public convenience and necessity authorizing the service prevail over the terms of the contract should there be a conflict between them.[8] *California* v. *Southland Royalty Co.*, 436 U.S. 519, 526-7 (1978); *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588, 596-7 (3d Cir. 1977).

The Commission has not yet decided whether K N's interruptions of Great Western were in conformity with K N's regulatory obligations.[9] Until it does, the

---

[7] See Br. in Opp. p. 11. Great Western asserts that the contracts with K N "date back to 1955 and . . . were renewed throughout the relevant time period without material change . . ." (Br. in Opp. p. 2). This is not correct. The service to only one plant dates back to 1955. The contracts were materially revised in 1973 in response to the Commission's Statement of Policy Order Nos. 467, *et al.*, issued in Utilization and Conservation of Natural Resources, 49 FPC 85, 217, 583 (1973). See Br. in Opp. p. 12.

[8] K N's certificates require compliance with the Commission regulations which impose a duty on K N to enforce its tariff.

[9] That matter is now pending before the Commission in K N Energy, Inc., Docket No. TC82-43-000. See K N's Pet. for Writ, n. 12. Great Western's reliance on certain Commission orders to support a thesis that the matter has already been decided contrary to K N's position is misplaced. Kansas-Nebraska Natural Gas Co., Inc., 59 FPC 854, 858-9 (1976), *aff'd* 59 FPC 851 (1977), involved a proposal to abandon service to power plants with alternate fuel capability. (See Great Western Br. in Opp. n. 11) The fact that the use of natural gas in the plants was declining (due to interrup-

Colorado courts will not be in a position to decide whether K N acted in breach of its contracts with Great Western. Should the Commission not file a pleading with this Court in response to K N's Petition for Writ of Certiorari, the Court might direct an inquiry to the Solicitor General to determine the Commission's reaction to K N's petition for writ and when the Commission will issue its final decision in Docket No. TC82-43-000 now pending before it.[10]

---

tions under the storage withdrawal policy of which Great Western complains), was cited by the Commission as a reason for not pursuing the abandonment route at that time. Kansas-Nebraska Natural Gas Company, Inc., 1 FERC ¶ 61,110, p. 61,297 (1977).

Great Western improperly cites three decisions of Administrative Law Judges ("ALJs") which never became final orders of the Commission due to the fact that the Commission reversed the basic determination of the ALJ and remanded for further proceedings (58 FPC 2899 (1977)), did not act upon exceptions to the decision (6 FERC ¶ 63,055 (1979)), or has not yet acted on exceptions to the ALJ's initial decision (30 FERC ¶ 63,049 (1985)). (Br. in Opp. pp. 4, 5, 12, 15, 20 and notes 11, 13, 15 and 17) Section 8(b) of the Administrative Procedure Act provides:

> "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 USC § 557(b).

[10] See procedure followed by this Court in Arkansas-Louisiana Gas Co. v. Hall, 449 U.S. 814 (1980). Great Western is correct when it notes (Br. in Opp., p. i) that the FERC did not file with the Colorado Supreme Court, a "petition for a writ of certiorari." The Commission's filing was a motion for leave to file a brief *amicus curiae* if the Supreme Court granted certiorari. The motion stated that "the Commission has a substantial interest in the outcome of this proceeding," but the Commission did not participate further when the Colorado Supreme Court failed to grant certiorari on the question of "primary jurisdiction."

II

AN AWARD OF DAMAGES TO GREAT WESTERN WOULD BE CONTRARY TO SECTION 4 OF THE NATURAL GAS ACT.

The second question presented by K N's petition relates to whether an award of damages to Great Western would constitute an undue preference or advantage in contravention of Section 4(b) of the Natural Gas Act and a violation of the "filed rate doctrine" discussed by this Court in *Arkansas Louisiana Gas Company* v. *Hall,* 453 U.S. 571 (1981) in contravention of Section 4 of the Act.[11]

Great Western does not deny that the issue of undue preference or advantage was before the trial judge.[12] It does assert that the "filed rate doctrine" was not brought to the attention of the trial court in 1979. (Br. in Opp. p. 21) Although applicability of the filed rate doctrine to natural gas pipelines crystalized in *Arkansas Louisiana* some two years later, we

---

[11] The purpose of the "filed rate doctrine" is to require the pipeline to operate in accordance with its published tariff. When a pipeline proposes to alter its prices or its practices from those detailed in its tariff, it must file a tariff change under Section 4(d) of the Act, 15 U.S.C. § 717c(d), which change is then subject to review, suspension, hearing and decision by the Commission. The texts of Sections 4(d) and 4(e) of the Act are set out in Appendix A to this Reply.

[12] Item 7 of K N's Motion requesting the trial court to refer issues to the FERC reads: "Would an award of damages by this court to Great Western constitute an undue preference or advantage in contravention of Section 4(b) of the Natural Gas Act?" See App. H to K N's Pet. for Writ, p. 74a.

submit that K N's litigating position before the trial court encompassed that defense.[12]

Great Western asserts that no undue preference or advantage can result from an award of damages because "there is nothing blocking other interruptible customers similarly situated from also bringing suit against K N and recovering appropriate damages." (Br. in Opp. p. 22) It is not clear what is meant by "similarly situated." K N has indirect interruptible customers in a number of states. Great Western has no basis for assuming that courts in other states and lower federal courts would adopt the same construction of K N's contractual obligations, Commission orders, rules, regulations and K N's tariff, and similarly reject the premise that the Commission has exclusive jurisdiction over K N's interruption of interruptible service in interstate commerce. Great Western's solution is to allow litigation against K N in state and federal trial courts of several jurisdictions. This simply ensures that there will not be the uniformity and impartiality of service in interstate commerce which the Natural Gas Act was intended to promote through uniform federal regulation by the Commission. *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 634-5; *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.,* 177 F.2d 942, 945 (6th Cir. 1949).

---

[12] Item 8 of K N's motion requesting the trial court to refer issues to the FERC reads: "Would an award of damages by this court to Great Western for interruptions in service beginning in November, 1973 adversely affect the FERC's ability to carry out its responsibilities under Sections 4, 5 and 7 of the Natural Gas Act? *Ibid.*

CONCLUSION

For the reasons stated above and in K N's petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT C. MCHUGH, Esq.
K N Energy, Inc.
P.O. Box 15265
Lakewood, Colorado 80215

B. J. BECKER, Esq.
K N Energy, Inc.
P.O. Box 608
Hastings, Nebraska 68901

JOHN P. FURMAN, Esq.
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Attorneys for K N Energy, Inc.

JOHN T. MILLER, JR., Esq.
1001 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 331-1630

Counsel of Record

APPENDIX

APPENDIX A

Provisions of the Natural Gas Act
(15 U.S.C. §§ 717 *et seq.*)

SEC. 4(d)

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. (15 U.S.C. § 717c(d))

SECTION 4(e)

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may sus-

pend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (15 U.S.C. § 717c(e))